UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

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ISSUED UNDER THE

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PREFATORY NOTE

Agriculture Decisions is an official publication designed to facilitate access to decisions and orders issued by the Secretary of Agriculture, or officers authorized to act in his stead, in matters arising under laws administered by the Department of Agriculture.

The published decisions principally consist of those issued in formal adjudicatory administrative proceedings conducted for the Department under various statutes and regulations pursuant to the Administrative Procedure Act. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the Federal Register and, therefore, they are not included in Agriculture Decisions.

Consent Decisions entered subsequent to December 31, 1986 are no longer published. However, a list of these decisions is included. (53 F.R. 6999, March 4, 1988.) The decisions are on file and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges.

Decisions are published in order of their issuance or finality under the principal statutes administered by the Department, which are the Agricultural Marketing Act of 1946 (7 U.S.C. § 1621 *et seq.),* the Agricultural Marketing Agreement Act of 1937 (U.S.C. § 601 *et seq.),* Animal Quarantine and Related Laws (21 U.S.C. § 111 *et seq.),* the Animal Welfare Act (7 U.S.C. § 2131 *et seq.),* the Federal Meat Inspection Act (21 U.S.C. § 601 *et seq.),* the Grain Standards Act (7 U.S.C. § 1821 *et seq.),* the Horse Protection Act (15 U.S.C. § 1821 *et seq.),* the Packers and Stockyards Act, 1921 (7 U.S.C. § 181 *et seq.),* the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. § 499a *et seq.),* the Plant Quarantine Act (7 U.S.C. § 151 *et seq.),* the Poultry Products Inspection Act (21 U.S.C. § 451 *et seq.),* and the Virus-Serum-Toxin Act of 1913 (21 U.S.C. §151 *et seq.).*

The published decisions may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket or decision number. Prior to 1942 decisions were identified by docket and decision numbers, e.g., D-578; S. 1150 and the use of such references generally indicates that the decision has not been published in Agriculture Decisions.

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In re: SAULSBURY ORCHARD and ALMOND PROCESSING, a California Corporation; CAL ALMOND, INC.; CARLSON FARMS, a sole Proprietorship.
AMA Docket No. F&V 981-4.
Ruling filed October 27, 1988.

Inappropriate to rule on declaratory order before n decision on the merits.

The Judicial Officer ruled in response to questions certified by Judge Bernstein that it is inappropriate to rule on petitioners' request for a declaratory order, in advance of any determination as to their position on the merits. Petitioners seek a declaratory order as to whether advertising assessments petitioners have been required to pay under the Federal Marketing Order for Almonds Grown in California will be returned, if petitioners ultimately prevail, and as to the source of such funds, if any. The "Secretary" has not issued a final decision as to the constitutionality of the specific brand advertising assessments, since the Judicial Officer has not yet ruled as to this matter.

Donald A. Tracy, for Respondent.
Brian C. Leighton, Fresno, CA, for Petitioners.
Ruling issued by Donald A. Campbell, Judicial Officer.

RULING ON CERTIFIED QUESTIONS

On August 18, 1988, Administrative Law Judge Edwin S. Bernstein certified to the Judicial Officer questions raised by petitioners in a motion filed May 26, 1988. Petitioners' motion seeks a ruling (i) as to whether advertising assessments they have been required to pay under Federal Marketing Order for Almonds Grown in California (7 C.F.R. Part 981) will be returned, if petitioners ultimately prevail in this proceeding which they instituted under § 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A)), (ii) if so, whether such reimbursement would be from a fund to which petitioners are not required to contribute, and (iii) that the Secretary has filed a final decision, so that petitioners can proceed to district court, with respect to whether specific brand advertising assessments are a violation of the First Amendment to the Constitution.

As to the first two issues, petitioners are seeking a declaratory order in advance of any determination as to their position on the merits, which is not provided for in the rules of practice. Accordingly, no ruling should be made on these issues.

As to the third issue, the Secretary has delegated his authority to tl Judicial Officer to determine issues such as those raised by petitioners in th § 8c(15)(A) proceeding (see 7 C.F.R. § 2.35).[1] Since the Judicial Officer h. not issued a final decision and order with respect to petitioners' amende petition, the "Secretary" has not issued a final decision as to th constitutionality of the specific brand advertising assessments.

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[1] The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg 3219 (1953), *reprinted in* 5 U.S.C. app at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

In re: ARTURO RAMOS and MANUEL RAMOS, d/b/a OSCARIAN BROS. CIRCUS.
AWA Docket No. 322.
Order filed September 30, 1988.

Order issued by Edwin S. Bernstein, Administrative Law Judge.

FILING OF CONSENT DECISION AND ORDER AND MOTION TO DISMISS RESPONDENT ARTURO RAMOS

Complainant is filing with this Motion a consent decision and order in this case. The order is signed by complainant's attorney and by respondent Manuel Ramos of the Oscarian Bros. Circus. Apparently Arturo Ramos is no longer with the Circus and neither the Hearing Clerk nor APHIS has been able to find him in over a year to serve any papers on him. For these reasons, complainant moves to dismiss the case as to Arturo Ramos and cancel the hearing in this matter set for December 14, 1988.

[The motion was granted October 4, 1988.--Editor.]

In re: STEPHEN A. FARROW.
A.Q. Docket No. 339.
Dismissal filed October 24, 1988.

Jaru Ruley, for Complainant.
John Woods, Indianapolis, IN, for Respondent.
Order issued by Victor W. Palmer, Chief Administrative Law Judge.

DISMISSAL OF COMPLAINT AND CANCELLATION OF ORAL HEARING

The complaint in the above-entitled proceeding is hereby dismissed as complainant has requested and the oral hearing scheduled for November 8-9, 1988, in Louisville, Kentucky, is hereby canceled.

In re: M.H. PITTS.
A.Q. Docket No. 170.
Decision and Order issued August 19, 1988.

Interstate movement of cattle without required certificate - Admission of material allegations.

Joseph Pembroke, for Complainant.
Gerald Dickerson, Lucedale, MS, for Respondent.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

DECISION AND ORDER

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the improper interstate movement on certain means of conveyance of cattle (9 C.F.R. § 78.9(c)), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 9 C.F.R. § 70.1 *et seq.* and 7 C.F.R § 1.130 *et seq.*

This proceeding was instituted by Complaints filed on May 14, 1985, and January 31, 1986, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The Complaints alleged that respondent moved cattle interstate without the proper certificate or permit for entry in violation of section 78.9(c) of the regulations (9 C.F.R. § 78.9(c)).

On June 20, 1985, and March 4, 1986, the respondent filed Answers. These answers and subsequent affidavits filed by Complainant with its Motion For Adoption of Proposed Decision[1] verify the material allegations contained in the Complaints and eliminate the need for a hearing.

Accordingly, the material allegations alleged in the Complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued consonant with section 1.139 of the applicable Rules of Practice. (7 C.F.R. § 1.139).

Findings of Fact

1. M.H. "Curley" Pitts, respondent, is an individual whose address is P.O. Box 105, Lueednle, Mississippi 39452.

2. On several occasions from November 1984, through August 5, 1985, respondent moved cattle interstate in violation of section 78.9(c) of the regulations (9 C.F.R. § 78.9(c)) because the movements were not accompanied by a certificate or "Permit for Entry."

Conclusions

By reason of the facts contained in the Findings of Fact above, the respondent has violated section 78.9(c) of the regulations (9 C.F.R. § 78.9(c)).

Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of six thousand five hundred dollars ($6,500.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to U.S. Department of Agriculture, APHIS Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North Sixth Street, Minneapolis, Minnesota 55403, within thirty (30) days from the effective date of this order. This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty-five (35) days after service of this Decision and Order upon the respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final October 4, 1988.--Editor.]

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[1] The motion for adoption of the proposed decision was duly served upon respondent who has failed to file objections thereto as provided by the governing rules of practice.

In re: RICHARD REDLAND, JR.
A.Q. Docket No. 295.
Decision and Order filed August 19, 1988.

Interstate movement of cattle without two consecutive official negative tests for brucellosis - Failure to appear at the hearing.

Christine O'Leary, for Complainant.
Respondent, pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

On July 14, 1988, an Administrative Hearing was held in the Executive Office for Immigration Review, Room A-513, Federal Building, 727 East Durango Boulevard, San Antonio, Texas to determine if Richard Redland, Jr. had violated livestock regulation 9 C.F.R. § 78.9(d)(3)(iii). The November 6, 1986, Complaint issued by the Administrator of the Animal and Plant Health Inspection Service alleged that Mr. Redland violated the regulation by moving interstate from Detroit, Texas to Bairoil, Wyoming approximately forty-four (44) cattle, which were two years of age or older, because the cattle had not been subjected to two consecutive official negative tests for brucellosis, as required.

On December 1, 1986, Mr. Redland filed an answer stating that he was not the owner of the cattle; but not responding as to whether he was involved in moving the cattle. In addition, Redland admitted he arranged for final testing on the cattle; but neither admitted nor denied that two consecutive official negative tests for brucellosis had been conducted on the cattle. Mr. Redland was properly served with the Complaint and Notice of Hearing in accordance with the Rules of Practice 7 C.F.R. § 1.147.

Despite receiving such service, neither Richard Redland, Jr., nor any representative of Mr. Redland appeared at the hearing. Mr. Redland's failure to appear at the hearing after being properly served and duly notified constitutes a waiver of a right to a hearing and admission of any facts which may be presented at the hearing. Testimony taken at the hearing revealed that respondent moved interstate approximately forty-four cattle, which were over two years of age from Detroit, Texas to Bairoil, Wyoming, in violation of section 78.9(d)(3)(iii) of the regulations (9 C.F.R. § 78.9(d)(3)(iii)), because the cattle had not been subjected to two consecutive official negative tests for brucellosis, as required. Such failure by Respondent to appear at the hearing shall also constitute an admission of all the material allegations of the facts contained in the Complaint. *In re: Craig Landeen*, 45 Agriculture Decision 2006 (1986); 7 C.F.R. Section 1.141(c).

Findings of Fact

1. Richard Redland, Jr., hereinafter the Respondent, is an individual whose last known mailing address is Benson Loop Road, Box 425, Uvalde, Texas 78801.

2. On or about May 20, 1985, the respondent moved approximately forty-four (44) cattle, over 2 years of age, interstate from Detroit, Texas to Bairoil, Wyoming in violation of section 78.9(d)(3)(iii) of the regulations (9 C.F.R. § 78.9(d)(3)(iii)), because the cattle had not been subjected to two consecutive official negative tests, as required.

Conclusions

By reason of the facts in the findings of fact set forth above, the respondent has violated section 78.9(d)(3)(iii) of the regulation (9 C.F.R. § 78.9(d)(3)(iii)). Therefore, the following order is issued.

Order

Respondent Richard Redland, Jr., is hereby assessed a civil penalty of five hundred dollars ($500.00). The Respondent shall send a certified check or money order payable to the "Treasurer of the United States" to United States Department of Agriculture, Animal and Plant Health Inspection Service Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, Minneapolis, Minnesota 55403.

The order shall be final and effective 35 days after service of this Decision and Order upon Respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final October 31, 1988.--Editor.]

In re: ROBERT LEWIS TAYLOR.
A.Q. Docket No. 88-7.
Default Decision and Order issued August 19, 1988.

Untreated garbage allowed into feeding areas and fed to swine - Failure to furnish information about source of garbage - Failure to file an answer.

Patrice Harps, for Complainant.
Respondent, pro se.
Default Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

DEFAULT DECISION AND ORDER

This proceeding was instituted under the Swine Health Protection Act (Act) (7 U.S.C. § 3801 *et seq.*) by a complaint issued by the Acting

Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that respondent violated sections 166.2(a), 166.6, 166.7(a), and 166.12(d) of the regulations (9 C.F.R. §§ 166.2(a), 166.6, 166.7(a) and 166.12(d)) issued under the Act. A copy of the complaint and the rules of practice governing proceedings under the Act were served by certified mail on respondent by the Hearing Clerk on April 1, 1988.

Respondent was informed in the complaint and in the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, that failure to deny, otherwise respond or plead specifically to any allegation in the complaint would constitute an admission of such allegation, and that failure to file an answer within the prescribed time would constitute an admission of the allegations in the complaint and waiver of hearing. The letter of service also advised respondent that failure to request an oral hearing within the time for filing an answer would constitute a waiver of an oral hearing. Respondent's answer was untimely filed and fails to deny, otherwise respond or plead specifically to any allegation in the complaint, or request an oral hearing.

Respondent's failure to file an answer within the time prescribed by section 1.136(a) of the rules of practice (7 C.F.R. § 1.136(a)), and failure to deny or plead specifically to an allegation in the complaint, constitute an admission of the allegations in the complaint pursuant to section 1.136(e) of the rules of practice (7 C.F.R. § 1.136(e)) and a waiver of hearing pursuant to section 1.139 of the rules of practice (7 C.F.R. § 1.139). Because no basis for a hearing exists, the material allegations of fact in the complaint are adopted and set forth as the Findings of Fact.

Findings of Fact

1. (a) Robert Lewis Taylor, herein referred to as the respondent, is an individual whose address is 506 Quaker Bridge Road, Jacksonville, North Carolina 28540.

(b) At all times material to this complaint, the respondent operated a swine feeding area at 506 Quaker Bridge Road, Jacksonville, North Carolina 28540.

(c) At all times material to this complaint, the respondent held a license to treat garbage, number 55-6-0001, at the Kearney farm, off Country Road 1243, Jacksonville, North Carolina 28540.

2. On or about August 26, 1987, the respondent fed or permitted the feeding of garbage to swine in violation of sections 166.2(a) and 166.7(a) of the regulations (9 C.F.R. §§ 166.2(a) and 166.7(a)), because the garbage was not treated to kill disease organisms, as required.

3. On or about August 26, 1987, the respondent allowed untreated garbage into swine feeding areas in violation of section 166.6 of the regulations (9 C.F.R. § 166.6).

4. On or about August 28, 1987, the respondent fed or permitted the feeding of garbage to swine in violation of sections 166.2(a) and 166.7(a) of

the regulations (9 C.F.R. §§ 166.2(a) and 166.7(a)), because the garbage was not treated to kill disease organisms, as required.

5. On or about August 28, 1987, the respondent allowed untreated garbage into swine feeding areas in violation of section 166.6 of the regulations (9 C.F.R. § 166.6).

6. On or about September 4, 1987, the respondent fed or permitted the feeding of garbage to swine in violation of sections 166.2(a) and 166.7(a) of the regulations (9 C.F.R. §§ 166.2(a) and 166.7(a)), because the garbage was not treated to kill disease organisms, as required.

7. On or about September 4, 1987, the respondent allowed untreated garbage into swine feeding areas in violation of section 166.6 of the regulations (9 C.F.R. § 166.6).

8. On or about September 4, 1987, the respondent violated section 166.12(d) of the regulations (9 C.F.R. § 166.12(d)), by failing to furnish information concerning sources of garbage upon request by an authorized representative of the Department, as required.

Conclusion

Respondent has failed to respond in the required manner to the allegations in the complaint. By reason of the Findings of Fact set forth above, respondent has violated the Act and the regulations issued under the Act. Therefore, the following Order is issued. The status of the pleading do not permit the Judge to do otherwise. In the event of appeal to the Judicial Officer, the respondent might seek case precedent and justification for the assessed penalty.

Order

1. Respondent Robert Lewis Taylor is hereby assessed a civil penalty of $21,000.00, which shall be payable to the "Treasurer of the United States" by certified check or money order and which shall be forwarded within thirty (30) days from the effective date of this Order to:

USDA, APHIS Field Servicing Office
Accounting Section, Butler Square West
5th Floor, 100 North 6th Street
Minneapolis, Minnesota 55403

Respondent shall indicate on the certified check or money order that payment is in reference to A.Q. Docket No. 88-7.

2. Respondent Robert Lewis Taylor, his agents and employees, directly or indirectly through any corporate or other devise, shall cease and desist from:

(a) Feeding or permitting the feeding of untreated garbage to swine.

(b) Allowing untreated garbage into swine feeding areas.

(c) Failing to furnish information concerning sources of garbage upon request by an authorized representative of the Department.

This Order shall have the same force and effect as if entered after full hearing and shall be final and effective thirty-five (35) days after service of this Decision and Order upon respondent, unless respondent appeals to the Judicial Officer pursuant to section 1.145 of the rules of practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final October 31, 1988.--Editor.]

In re: VERMONT MEAT PACKERS, INC.
FMIA Docket No. 102, PPIA Docket No. 18.
Ruling filed October 27, 1988.

Joseph Pembroke, for Complainant.
Philip Olsson, Washington, D.C., for Respondent.
Ruling issued by Victor W. Palmer, Chief Administrative Law Judge.

RULINGS ON POST-DECISION PETITIONS, MOTIONS AND OBJECTIONS

The Decision

On July 1, 1988, I issued a decision and order withdrawing federal meat inspection service from Vermont Meat Packers. I concluded Vermont had not complied with the consent decision and order previously entered on January 30, 1984. The consent decision held withdrawal of inspection in abeyance, conditioned upon Vermont having "no business dealings with any domestic firms with which Steve Mintz is associated as an officer, director, employee, or consultant, and which prepare, sell, or distribute meat or poultry products."

Steve Mintz while Vermont's vice president, was convicted of bribing a meat inspector. The consent decree sought Vermont's continuation as a federally inspected meat plant insulated from Steve Mintz's control. The insulation was confined to "domestic firms" because the Department lacks jurisdiction over several Canadian firms Mintz leads. Mintz was known to own Rupari Food Services, a domestic firm office in Florida, and it was understood by Vermont and the Department that *no* dealings between Vermont and Rupari would be permitted.

I found the most persuasive evidence showing prohibited dealings between Vermont and Rupari to be the testimony of Mr. Marion Whitescarver, director of franchised operations for Sonny's Real Pit Bar-B-Q. I found Mr. Whitescarver to be a disinterested and a most credible witness who testified to meetings on the purchase of pork products that included officers of both Vermont and Rupari and a salesman/broker who worked for both. Mr. Whitescarver's best recollection was that the first meeting was held in the Spring of 1985, and that Steve Mintz attended it as a spokesman for both firms. He recalled that everyone who attended the meetings spoke for both firms. Additionally, Whitescarver testified to subsequent telephone conversations with Steve Mintz acting as a representative for both Vermont and Rupari.

There was, however, other evidence of dealings between Vermont and Rupari. Most of Vermont's briefing rhetoric was directed against this other evidence. Vermont wrote off Mr. Whitescarver as a friend of the salesman/broker, Frank Pulley, who was upset by the way Pulley had been treated by Vermont's president, John McAlleer, and by Mintz. I concluded

this circumstance did not influence Whitescarver's testimony. Moreover, his testimony was consistent with and corroborated the other evidence of prohibited dealings.

The Post-Decision Filings

On July 12, 1988, Vermont filed a petition to reopen the hearing to take additional evidence. After the hearing, Vermont's president wrote to Mr. Whitescarver asking him to reconsider his "very damaging" testimony. Whitescarver in a response dated May 23, 1988, stated his records showed Frank Pulley, John McAleer and Jerry Puttiek were in his office on October 23, 1985 and showed Frank Pulley and John McAleer returned on October 30, 1985.

On July 22, 1988, a reply to respondent's petition to reopen was filed to which was attached an affidavit by Mr. Whitescarver, dated July 18, 1988. Whitescarver's affidavit affirms his testimony that he had meetings in his Gainesville office with Frank Pulley, John McAleer, Mintz and Jerry Puttick on the purchase of pork ribs and collars, and that each of them represented both Vermont and Rupari. Whitescarver pointed out he testified he could not recall the exact dates of the meetings. He stated he "also had conversations with Mr. Mintz on several occasions concerning price and ways to get the units to use more of the product." Whitescarver concluded: "But when I got back and checked my records the meetings were held in October 1985 with Pulley, McAleer and Jerry Puttick."

On July 25, 1988, the law firm of Williams and Connally filed a motion to intervene on behalf of Steve Mintz and one of his Canadian firms, Unifoods, Ltd.

On July 29, 1988, Vermont filed an opposition to complainant's reply. Vermont urged inconsistencies between Whitescarver's two post-hearing statements demonstrated a need to reopen the hearing. Vermont also filed a copy of Whitescarver's diary and an affidavit obtained from a Mr. Walker, a co-employee of Whitescarver. Walker's affidavit stated he came into the initial meeting Whitescarver had with Vermont's representatives and, based upon a photograph he was shown of Mintz, Walker was "confident" Steve Mintz was not present.

On August 2, 1988, the Department's attorneys filed an opposition to the motion to intervene.

On August 12, 1988, the Department's attorneys filed a reply to respondent's petition for the hearing's reopening.

On August 16, 1988, the attorneys for Mintz and Unifoods, Ltd., filed a reply to complainant's opposition to the motion to intervene.

On August 23, 1988, the Department's attorneys filed what amounts to an objection on procedural grounds to the response to their reply to the motion to intervene.

On August 26, 1988, Vermont filed a memorandum of points and authorities in support of reopening the hearing. In it, Vermont charges that the Department's attorneys frustrated Vermont's preparation of its case by instructing Whitescarver not to speak to Vermont's attorneys. Vermont

further alleges Mr. Walker, Whitescarver's co-employee, was neither called by the Department's attorneys nor identified to Vermont because his testimony would have damaged the Department's case.

On August 30, 1988, the Department's attorneys filed a reply to respondent's memorandum of points and authorities, stating they never counseled witnesses not to talk to Vermont's attorneys but did tell them they were not required to speak with them. They specifically denied that they ever spoke with Mr. Walker or otherwise contacted him.

On September 14, 1988, the attorneys for Steve Mintz and his Canadian firm, Unifoods, Ltd., filed a reply to complainant's filing of August 23, 1987.

On September 22, 1988, Vermont filed a request that I make "clarifying inquiries" to determine whether Mr. Walker was contacted by the attorneys or other representatives of the Department before the hearing, and was known to have been present at the meeting Whitescarver stated Mintz attended.

Rulings

1. The Petition To Reopen and the Request For Clarifying Inquiries are Denied

a) *The new evidence seeks merely to impeach and would not change the outcome.* The applicable rules of practice permit the reopening of a hearing to take further evidence which is not merely cumulative when a good reason is given why this evidence was not addressed at the hearing. (7 CFR § 1.146 (2)).

This administrative requirement is similar to the judicial practice regarding newly discovered evidence, and case law interpreting comparable federal rules of procedure is applicable. *Roman Crest Fruit, Inc.* 46 Agric. Dec. ____, (April 7, 1987), *slip opinion*, at 24-25, citing pertinent cases.

The fundamental elements federal courts require for a reopening to receive newly discovered evidence are: (1) the evidence must be material; (2) the evidence may not be merely cumulative or impeaching; (3) the evidence was unavailable to a diligent litigant at the hearing; and (4) the evidence will probably change the outcome of the case. *Taylor v. Texgas Corp.*, 831 F.2d 255, 259 (11th Cir. 1987); and *Osburn v. Anchor Laboratories, Inc.*, 825 F.2d 908, 917 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 1476 (1988).

The evidence Vermont seeks to introduce is directed against Whitescarver's testimony that Mintz helped Vermont to sell spareribs to Sonny's Bar-B-Q.

Whitescarver's 1985 diary and Walker's testimony would be used to discredit Whitescarver's testimony that Mintz was one of Vermont's representatives at the initial meeting in Whitescarver's office. Additionally, Vermont would introduce telephone records to refute Whitescarver's

testimony he had subsequent telephone calls with Mintz in which Mintz promoted Vermont's rib sales to Sonny's.

The contemplated evidence has but one purpose - Whitescarver's *impeachment.*

A hearing may not be reopened to receive impeaching evidence. *See Taylor and Osburn, supra.*

Nor will a case be reopened if the new evidence is not likely to change the outcome of the case. For this reason a principal case relied upon by Vermont is inapposite. The court in *Television Reception Corporation v. Dunbar*, 426 F.2d 174, 180 (6th Cir. 1970), reopened a case to receive newly discovered evidence because it concluded the evidence was of the kind that "if credited, would probably produce a different result."

If it is assumed Whitescarver was mistaken about Mintz's attendance at the initial meeting,[1] his testimony concerning other conversations in which Mintz promoted Vermont's rib sales would still stand. An absence of notations on calendars or in billings for selected telephones would not eliminate the very real possibility Mintz used pay phones or other non-traceable telephones to place the calls.

But even if Whitescarver had not testified at all, it would still be necessary to find that Vermont and Rupari had prohibited business dealings. Findings 9 and 10 of the initial decision, detail the ways in which the two firms cooperatively serviced the Sonny's Bar-B-Q account. Those findings are fully substantiated by evidence other than Whitescarver's testimony which proved:

1. Frank Pully acted as a sales broker for both Vermont and Rupari on sales of product to Sonny's from the Spring of 1985 through February of 1987. During this period of time, he was paid a commission by Vermont. He sought and received a draw from Vermont against this commission at the rate of $1,500 per week. He sought a higher draw of $2,000 a week and in response to his underlying complaint that he was not being paid a sufficient amount to cover his expenses, his telephone expenses were thereafter paid by Rupari. He had been instructed by Steve Mintz to give Vermont his sales of spareribs to Sonny's rather than giving the sales to Rupari.[2] (Finding 9)

2. Eddie Pawlak, Rupari's Vice-President of sales, authorized a price modification on spareribs sold to Sonny's by Vermont which had been shipped on February 6, 1987 and delivered on February 10, 1987. (Finding 10(b) and Cx 26)

3. Sonny's distributor "IDI", received a Rupari invoice covering both pork collars and "Sonny's Spare Ribs VMP" shipped to Riviera Beach on November

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[1] A review of the record shows that if the first meeting was held in October 1985, and not in the Spring of 1985, it still took place in advance of Vermont's rib sales to Sonny's Bar-B-Q.

[2] All of the spareribs Sonny's purchased were processed by Vermont and whenever Rupari sold Sonny's "special trim spareribs", it was selling product trimmed by Vermont to Sonny's specifications.

5, 1986. (Finding 10(c) and Cx 12)

4. By letter dated April 18, 1986, from E. R. Pawlack, Vice-President, Sales, on Rupari's letterhead, Sonny's was thanked "... for your support and usage of Special Trim Sonny's Spare Ribs. This product is especially trimmed and packed for Sonny's and has proved successful beyond expectations. Some of you have even stated that your yields have been up to 30% better since embarking on the program, thus resulting in higher profits. This is very good news indeed and should encourage those not currently using our Special Trim Spare Ribs to do so." (Finding 10(d) and Cx 66)

Therefore, even without Whitescarver's testimony, the evidence established "business dealings" by Rupari and Vermont in violation of the terms of the consent decree.

b) *The reopening of the hearing is not justified by "surprise" or "obstruction of justice"*

Vermont complains that the limited form of discovery permitted under the rules of practice, precluded meaningful pre-hearing discovery and led to it being surprised by Whitescarver's testimony. Further, Vermont charges it was denied a fair hearing in violation of the due process clause, because "exculpatory" materials were not volunteered by complainant's counsel.

Alleging that Whitescarver's testimony came as a total surprise, Vermont contends that it was then "cut off from further examination of Mr. Whitescarver when that witness was not held for recall by the presiding Judge."

This contention I shall address first.

Complainant named Mr. Whitescarver on the witness list it exchanged for Vermont's list in advance of the hearing. The list's specification of Whitescarver's anticipated testimony was skimpy, but no skimpier than given by Vermont for its proposed witnesses. Neither party complained nor asked for more details.

The hearing was held in Washington, D. C. at Vermont's request and over the complainant's objections. I decided, on balance, the convenience of Vermont's officers and its witnesses required the resulting inconvenience to complainant's witnesses who resided in Georgia and Florida. But when at the close of Whitescarver's cross-examination, Vermont's counsel requested he be held over indefinitely for re-cross, I ruled against the request as unfair to the witness and stated he would be excused to catch his return flight home that day. However, I pointed out Vermont could arrange to bring him back to elicit additional testimony by paying his added hotel and travel expenses. I then recessed to give Vermont's counsel time to see if there were any additional questions they wished to ask Whitescarver (Tr. 123). At the end of the recess, counsel for Vermont advised:

"Your Honor, at this time we have no further questions of the witness."

Vermont did not arrange for his later return to the stand.

The fact that a fuller form of discovery is not available in these proceedings reflects a policy many forums no longer follow. But it is a legally permissible policy this agency observes and is controlling. *See: Fairbanks v. Hardin*, 429 F.2d 264, 268 (9th Cir. 1969), *cert. denied*, 400 U.S. 943 (1970).

If hearings were, in any but the most extreme circumstances, reopened, and thus bifurcated, to enable parties to better respond to unanticipated evidence, this policy would be thwarted.

Vermont contends that it was also denied a fair hearing because complainant's counsel did not furnish "exculpatory" materials and obstructed its discovery. I have been requested to direct "clarifying inquiries" on this account.

The type of information complainant's counsel allegedly failed to volunteer, hardly qualifies as the "exculpatory" sort which must be furnished in criminal cases under *Brady v. State of Maryland*, 373 U.S. 83 (1963); nor was counsel's advise to witnesses that they need not speak to Vermont's counsel, equivalent to a prosecutor's admonition to witnesses in a criminal case that they were not to speak to defense counsel in the prosecutor's absence. *See Gregory v. United States*, 369 F.2d 185 (1966).

At any rate, the rules that protect the accused in criminal cases are without application here. *See Machado*, 42 Agric. Dec. 1454 (1983), *affirmed*, 749 F.2d 36 (9th Cir. 1984).

Accordingly, the reasons advanced by Vermont for reopening the hearing, and for making clarifying inquiries are insufficient and its petition and request are denied.

2. The Motion To Intervene is Denied

Steve Mintz and Unifoods, Ltd. have not demonstrated a need for special representation.

Counsel for Vermont have vigorously defended their client. This defense has been conducted in a manner that is in no way inconsistent with the interests of Mintz and Unifoods requiring their representation by independent counsel. Nor are the rights and interests Mintz and Unifoods seek protected of the kind cognizable in this proceeding.

One suspects that the real point of the motion is to obtain a very real trial advantage for Vermont if the hearing were reopened. Mr. Whitescarver would not only be required to withstand cross-examination anew from Vermont's attorneys who would now focus on his testimony; Mr. Whitescarver would then be handed over for further cross-examination by another trial lawyer from a firm of litigation specialists --- Williams and Connolly.

This ganging-up on the witness would be grossly unfair and is a principal reason why motions to intervene should not be generally granted.

In re: JUDY CHILDRESS AND LISA MORRIS.
HPA Docket No. 88-18.
Order filed October 12, 1988.

Donald Tracy, for Complainant.
Respondent, pro se.
Order issued by Victor W. Palmer, Chief Administrative Law Judge.

ORDER

The complainant has moved to dismiss the complaint in this matter.

Wherefore, for good cause shown, the complaint is hereby dismissed with prejudice.

In re: JAY C. DAVIS, d/b/a JAYCO CATTLE COMPANY.
P&S Docket No. D-88-60.
Decision and Order filed August 25, 1988.

Failure to furnish a bond - Failure to make payment - Failure to file an answer.

Edward M. Silverstein, for Complainant.
Respondent, pro se.
Decision and Order issued by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and the regulations promulgated thereunder (9 C.F.R. § 201.1 *et seq.*).

Copies of the complaint and the Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were personally served upon respondent. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. (a) Jay C. Davis, hereinafter referred to as the respondent, is an individual doing business as Jayco Cattle Co., whose mailing address is P.O. Box 340, Winona, Texas 75792.

(b) Respondent is, and at all times material herein was:

(1) Engaged in the business of buying livestock in commerce on a commission basis, and buying and selling livestock in commerce for his own account;

(2) A market agency and a dealer as those terms are defined in section 301 of the Act, 7 U.S.C. § 201; and

(3) Not registered with the Secretary as a market agency or a dealer as required by section 303 of the Act, 7 U.S.C. § 203.

2. The Packers and Stockyards Administration, by certified letter dated December 19, 1986, notified respondent that he was required to register with the Secretary of Agriculture and to furnish an adequate bond or its equivalent to secure the performance of his livestock obligations under the Act. Respondent was further notified that if he continued his livestock operations under the Act without registering with the Secretary and providing adequate bond coverage or its equivalent, he would be in violation of the Act and the regulations. Notwithstanding such notice, respondent has continued to engage in the business of a market agency and dealer buying and selling livestock for his own account and buying livestock on a commission basis without maintaining adequate bond coverage or its equivalent, as required by the Act and the regulations.

3. Respondent, on or about the dates and in the transactions set forth in paragraph III of the complaint, and on other occasions, issued checks in payment for livestock purchases which checks were returned unpaid by the bank upon which they were drawn because respondent did not have and maintain sufficient funds on deposit and available in the accounts upon which such checks were drawn to pay such checks when presented.

4. (a) On or about the dates and in the transactions set forth in paragraph IV of the complaint, and on other occasions, respondent purchased livestock and failed to pay, when due, for such livestock purchases.

(b) With regard to the above noted transactions, the following amounts remain due and owing:

Conclusions

By reason of the facts found in Finding of Fact 2 herein, respondent has violated section 312(a) of the Act (7 U.S.C. § 213(a)), and section 201.29 and 201.30 of the regulations (9 C.F.R. §§ 201.29, 201.30).

By reason of the facts found in Findings of Fact 3 and 4 herein, respondent has violated sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)).

Order

Respondent Jay C. Davis, d/b/a Jayco Cattle Co., his agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations;

2. Failing to pay, when due, the full purchase price of livestock; and

3. Issuing checks in payment for livestock without having and maintaining

sufficient funds on deposit and available in the bank account upon which they are drawn to pay such checks when presented.

Respondent shall not be registered to engage in business as a dealer and market agency for five years and thereafter until he demonstrates that he complies fully with the bonding requirements under the Act and the regulations; provided, however, that upon application to the Packers and Stockyards Administration, a supplemental order may be issued allowing such registration at any time after 210 days upon demonstration by respondent that all unpaid livestock sellers have been paid in full; and provided further that this order may be modified upon application to the Packers and Stockyards Administration to permit respondent's salaried employment by a registrant after the expiration of the 210 day period. Pursuant to section 303 of the Act (7 U.S.C. § 203), respondent is prohibited from engaging in business as a dealer or market agency subject to the Act without being registered.

The provisions of this order shall become effective on the sixth day after service of this order on the respondent. Copies of this decision shall be served upon the parties.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice (7 C.F.R. § 1.130 *et seq.*).

[This Decision and Order became final October 12, 1988.--Editor.]

In re: RICHARD N. GARVER.
P&S Docket No. 6449.
Order filed October 27, 1988.

Peter V. Train, for Complainant.
Thomas R. Smith, Cincinnati, OH, for Respondent.
Order issued by Donald A. Campbell, Judicial Officer.

REMOVAL OF STAY ORDER

The stay order previously issued in this proceeding pending the outcome of proceedings for judicial review is hereby lifted. The suspension provisions of the order previously filed on June 19, 1986, shall become effective on the 30th day after service of this order on respondent.

In re: GOLDEN GATE VEAL, INC., DANIEL J. HICKEY, and LEROY BETTINCOURT.
P&S Docket No. D-88-75.
Decision and Order filed August 25, 1988.

Failure to furnish a bond - Failure to make payment - Failure to file an answer.

Edward M. Silverstein, for Complainant.
Respondents, pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondents wilfully violated the Act and the regulations promulgated thereunder (9 C.F.R. § 201.1 *et seq.*).

Copies of the Complaint and Notice of Hearing and the Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served upon respondents by the Hearing Clerk by certified mail. Respondents were informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the Complaint and Notice of Hearing.

Respondents have failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the Complaint and Notice of Hearing, which are admitted by respondents' failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. (a) Golden Gate Veal, Inc., hereinafter "Golden Gate Veal," is a corporation whose business address is 11248 Victory Road, Oakdale, California 95361.

(b) At all material times, Golden Gate Veal was:

(1) Engaged in the business of purchasing livestock in commerce for purposes of slaughter, and of manufacturing or preparing meat and meat food products for sale or shipment in commerce; and

(2) A packer within the meaning of and subject to the provisions of the Act.

(c) Daniel J. Hickey, hereinafter referred to as "Hickey," is an

individual whose business address is 11248 Victory Road, Oakdale, California 95361.

(d) At all times material herein, Hickey was:

(1) Vice president of Golden Gate Veal;

(2) Owner of 46% of the corporate stock issued by Golden Gate Veal;

(3) Responsible, with Leroy Bettincourt, for the direction, management and control of Golden Gate Veal; and

(4) A packer within the meaning of and subject to the provisions of the Act.

(e) Leroy Bettincourt, hereinafter referred to as "Bettincourt," is an individual whose business address is 11248 Victory Boulevard, Oakdale, California 95361.

(f) At all times material herein, Bettincourt was:

(1) President of Golden Gate Veal;

(2) Owner of 45% of the corporate stock issued by Golden Gate Veal;

(3) Responsible, with Hickey, for the direction, management and control of Golden Gate Veal; and

(4) A packer within the meaning of and subject to the provisions of the Act.

2. By letter dated November 4, 1987, received by the respondents on November 10, 1987, respondents were notified that a review of their books and records by Departmental officials during the period October 26-30, 1987, disclosed that they were violating the bonding requirements of the Act and the regulations issued pursuant thereto. Respondents were further advised that their continued operation without the filing of a bond or bond equivalent in the amount of $10,000.00 would result in the bringing of disciplinary action against them. Despite the receipt of such notice, respondents have continued to engage in business as packers without maintaining an adequate bond or its equivalent as required by the Act and the regulations.

3. (a) On or about the dates and in the transactions set forth in paragraph III(a) of the Complaint and Notice of Hearing, and on divers other times, Golden Gate Veal, under the management, direction and control of Hickey and Bettincourt, purchased livestock and in purported payment therefor, issued checks which were returned unpaid by the bank upon which they were drawn because respondents did not have and maintain sufficient funds to pay such checks when presented.

(b) Golden Gate Veal, under the management, direction and control of Hickey and Bettincourt, in connection with its operations subject to the Act, in the transactions set forth in paragraph III(a) of the Complaint and Notice of Hearing, and on divers other times, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

Conclusions

By reason of the facts found in Finding of Fact 2 herein, respondents have wilfully violated section 202(a) of the Act (7 U.S.C. § 192(a)), and sections 201.29 and 201.30 of the regulations (9 C.F.R. §§ 201.29, 201.30).

By reason of the facts found in Finding of Fact 3 herein, respondents have wilfully violated sections 202(a) and 409 of the Act (7 U.S.C. §§ 192(a), 228b).

Order

Golden Gate Veal, Inc., its officers, directors, agents and employees, directly or through any corporate or other device, and Daniel J. Hickey and Leroy Bettincourt, directly or through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Purchasing livestock for slaughter without filing and maintaining a reasonable bond or its equivalent;
2. Failing to pay, when due, the full purchase price of livestock; and
3. Issuing checks in payment for livestock purchases without having and maintaining sufficient funds to pay such checks when presented.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondents are jointly and severally assessed a civil penalty in the amount of Four Thousand Dollars ($4,000.00).

The provisions of this order shall become effective on the first day after service of this order on the respondent. Copies of this decision shall be served upon the parties.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice (7 C.F.R. § 1.130 *et seq.*).

[This Decision and Order became final October 6, 1988.--Editor.]

In re: HGS CORPORATION, STEVEN W. SEAQUIST, MELOY H. "SLIM" HART, and OTTO C. GAITHER.
P&S Docket No. D-88-16.
Decision and Order filed September 1, 1988.

Failure to keep accounts, records and memoranda disclosing transactions - Failure to pay - Failure to file an answer.

Edward M. Silverstein, for Complainant.
Respondent, pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondents wilfully violated the Act.

Copies of the Complaint and Notice of Hearing and Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served upon respondents by the Hearing Clerk. Respondents were informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the Complaint and Notice of Hearing.

Respondents have failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the Complaint and Notice of Hearing, which are admitted by respondents' failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. (a) HGS Corporation, hereinafter referred to as HGS, is a corporation organized and operating in the State of Oregon whose mailing address is 1607 SE Railroad Avenue, Redmond, Oregon 97756.

(b) HGS is, and at all times material herein was:

(1) Engaged in the business of buying livestock in commerce for purposes of slaughter; and

(2) A packer within the meaning of and subject to the provisions of the Act.

(c) Steven W. Seaquist, hereinafter referred to as Seaquist, is an individual whose mailing address is 5385 NE 15th Drive, Redmond, Oregon 97756.

(d) Seaquist is, and at all times material herein was:

(1) President and owner of 33 1/3% of the stock of HGS; and

(2) A packer within the meaning of and subject to the provisions of the Act.

(e) Meloy H. "Slim" Hart, hereinafter referred to as Hart, is an individual whose mailing address is 5385 NE 15th Drive, Redmond, Oregon 97756.

(f) Hart is, and at all times material herein was:

(1) Vice President and owner of 33 1/3% of the stock of HGS; and

(2) A packer within the meaning of and subject to the provisions

of the Act.

(g) Otto C. Gaither, hereinafter referred to as Gaither, is an individual whose mailing address is 5385 NE 15th Drive, Redmond, Oregon 97756.

(h) Gaither is, and at all times material herein was:

(1) Secretary and owner of 33 1/3% of the stock of HGS; and

(2) A packer within the meaning of and subject to the provisions of the Act.

(i) HGS is, and at all times material herein was, under the management, direction and control of Seaquist, Hart and Gaither.

2. (a) As of March 31, 1987, the current liabilities of HGS exceeded its current assets. As of that date, the total current liabilities of HGS were $105,095.21 and its total current assets were $48,969.37. This resulted in an excess of current liabilities over current assets of $56,125.84.

(b) HGS' current liabilities presently exceed its current assets.

3. HGS, under the management, direction and control of Seaquist, Hart and Gaither, on or about the dates and in the transactions set forth in paragraph III of the Complaint and Notice of Hearing, and on other occasions, issued checks in payment of the net proceeds due from the purchase of livestock, which checks were returned unpaid by the bank upon which they were drawn because HGS did not have and maintain sufficient funds on deposit and available in the accounts upon which such checks were drawn to pay such checks when presented.

4. On or about the dates and in the transactions set forth in paragraph III of the Complaint and Notice of Hearing, and on other occasions, HGS, under the direction, management and control of Seaquist, Hart and Gaither, failed to remit, when due, the full purchase price due from its purchase of livestock.

5. HGS, under the management, direction and control of Seaquist, Hart and Gaither, failed to keep accounts, records and memoranda which fully and correctly disclosed all transactions in its business as a packer under the Act, in that it failed to keep and maintain (a) a general ledger; (b) cash receipts or a cash disbursement ledger; (c) a subsidiary accounts payable ledger; (d) a record showing the number of any checks which were replaced by wire transfers; (e) a record of its livestock purchases including the number of head purchased and all livestock purchase invoices; (f) a log of livestock received including cost; and (g) kill sheets, which include the date and the identity of the animals.

Conclusions

By reason of the facts found in Finding of Fact 1 herein, respondents Seaquist, Hart and Gaither are the *alter egos* of respondent HGS.

By reason of the facts found in Finding of Fact 2 herein, the financial condition of HGS does not meet the requirements of the Act (7 U.S.C. §

204).

By reason of the facts found in Findings of Fact 3 and 4 herein, respondents have violated sections 202(a) and 409 of the Act (7 U.S.C. §§ 192(a), 228b).

By reason of the facts found in Finding of Fact 5 herein, respondents have violated section 401 of the Act (7 U.S.C. § 221).

Order

HGS Corporation, its successors and assigns, its officers, directors, agents and employees, directly or through any corporate or other device, and Steven W. Seaquist, Meloy H. "Slim" Hart and Otto C. Gaither, directly or through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Purchasing livestock while insolvent, i.e., while current liabilities exceed current assets, unless the livestock is paid for at the time of purchase by United States currency, cashier's check or wire transfer of funds;

2. Failing to pay, when due, the full purchase price of livestock; and

3. Issuing checks in payment for livestock purchases without having and maintaining sufficient funds to pay such checks when presented.

Respondents shall keep and maintain accounts, records and memoranda which fully and correctly disclose the true nature of all transactions involved in their business subject to the Packers and Stockyards Act, including (a) a general ledger; (b) cash receipts or a cash disbursement ledger; (c) a subsidiary accounts payable ledger; (d) a record showing the number of any checks which were replaced by wire transfers; (e) a record of its livestock purchases including the number of head purchased and all livestock purchase invoices; (f) a log of livestock received including cost; and (g) kill sheets, which include the date and the identity of the animals.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondents are jointly and severally assessed a civil penalty in the amount of Three Thousand Five Hundred Dollars ($3,500.00).

The provisions of this order shall become effective on the sixth day after this decision becomes final. Copies hereof shall be served upon the parties.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice (7 C.F.R. § 1.130 *et seq.*).

[This Decision and Order became final October 13, 1988, as to Respondent Meloy H. "Slim" Hart.--Editor.]

In re: HGS CORPORATION, STEVEN W. SEAQUIST, MELOY H. "SLIM" HART, and OTTO C. GAITHER.
P&S Docket No. D-88-16.
Decision and Order filed September 1, 1988.

Failure to keep accounts records and memoranda disclosing transactions - Failure to pay - Failure to file answer.

Edward M. Silverstein, for Complainant.
Respondent, pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondents wilfully violated the Act.

Copies of the Complaint and Notice of Hearing and Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served upon respondents by the Hearing Clerk. Respondents were informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the Complaint and Notice of Hearing.

Respondents have failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the Complaint and Notice of Hearing, which are admitted by respondents' failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. (a) HGS Corporation, hereinafter referred to as HGS, is a corporation organized and operating in the State of Oregon whose mailing address is 1607 SE Railroad Avenue, Redmond, Oregon 97756.

(b) HGS is, and at all times material herein was:

(1) Engaged in the business of buying livestock in commerce for purposes of slaughter; and

(2) A packer within the meaning of and subject to the provisions of the Act.

(c) Steven W. Seaquist, hereinafter referred to as Seaquist, is an

individual whose mailing address is 5385 NE 15th Drive, Redmond, Oregon 97756.

(d) Seaquist is, and at all times material herein was:

(1) President and owner of 33 1/3% of the stock of HGS; and

(2) A packer within the meaning of and subject to the provisions of the Act.

(e) Meloy H. "Slim" Hart, hereinafter referred to as Hart, is an individual whose mailing address is 5385 NE 15th Drive, Redmond, Oregon 97756.

(f) Hart is, and at all times material herein was:

(1) Vice President and owner of 33 1/3% of the stock of HGS; and

(2) A packer within the meaning of and subject to the provisions of the Act.

(g) Otto C. Gaither, hereinafter referred to as Gaither, is an individual whose mailing address is 5385 NE 15th Drive, Redmond, Oregon 97756.

(h) Gaither is, and at all times material herein was:

(1) Secretary and owner of 33 1/3% of the stock of HGS; and

(2) A packer within the meaning of and subject to the provisions of the Act.

(i) HGS is, and at all times material herein was, under the management, direction and control of Seaquist, Hart and Gaither.

2. (a) As of March 31, 1987, the current liabilities of HGS exceeded its current assets. As of that date, the total current liabilities of HGS were $105,095.21 and its total current assets were $48,969.37. This resulted in an excess of current liabilities over current assets of $56,125.84.

(b) HGS' current liabilities presently exceed its current assets.

3. HGS, under the management, direction and control of Seaquist, Hart and Gaither, on or about the dates and in the transactions set forth in paragraph III of the Complaint and Notice of Hearing, and on other occasions, issued checks in payment of the net proceeds due from the purchase of livestock, which checks were returned unpaid by the bank upon which they were drawn because HGS did not have and maintain sufficient funds on deposit and available in the accounts upon which such checks were drawn to pay such checks when presented.

4. On or about the dates and in the transactions set forth in paragraph III of the Complaint and Notice of Hearing, and on other occasions, HGS, under the direction, management and control of Seaquist, Hart and Gaither, failed to remit, when due, the full purchase price due from its purchase of livestock.

5. HGS, under the management, direction and control of Seaquist, Hart and Gaither, failed to keep accounts, records and memoranda which fully and correctly disclosed all transactions in its business as a packer under the Act, in that it failed to keep and maintain (a) a general ledger; (b) cash receipts or a cash disbursement ledger; (c) a subsidiary accounts payable ledger; (d) a record showing the number of any checks which were replaced by wire

transfers; (e) a record of its livestock purchases including the number of head purchased and all livestock purchase invoices; (f) a log of livestock received including cost; and (g) kill sheets, which include the date and the identity of the animals.

Conclusions

By reason of the facts found in Finding of Fact 1 herein, respondents Seaquist, Hart and Gaither are the *alter egos* of respondent HGS.

By reason of the facts found in Finding of Fact 2 herein, the financial condition of HGS does not meet the requirements of the Act (7 U.S.C. § 204).

By reason of the facts found in Findings of Fact 3 and 4 herein, respondents have violated sections 202(a) and 409 of the Act (7 U.S.C. §§ 192(a), 228b).

By reason of the facts found in Finding of Fact 5 herein, respondents have violated section 401 of the Act (7 U.S.C. § 221).

Order

HGS Corporation, its successors and assigns, its officers, directors, agents and employees, directly or through any corporate or other device, and Steven W. Seaquist, Meloy H. "Slim" Hart and Otto C. Gaither, directly or through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Purchasing livestock while insolvent, i.e., while current liabilities exceed current assets, unless the livestock is paid for at the time of purchase by United States currency, cashier's check or wire transfer of funds;

2. Failing to pay, when due, the full purchase price of livestock; and

3. Issuing checks in payment for livestock purchases without having and maintaining sufficient funds to pay such checks when presented.

Respondents shall keep and maintain accounts, records and memoranda which fully and correctly disclose the true nature of all transactions involved in their business subject to the Packers and Stockyards Act, including (a) a general ledger; (b) cash receipts or a cash disbursement ledger; (c) a subsidiary accounts payable ledger; (d) a record showing the number of any checks which were replaced by wire transfers; (e) a record of its livestock purchases including the number of head purchased and all livestock purchase invoices; (f) a log of livestock received including cost; and (g) kill sheets, which include the date and the identity of the animals.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondents are jointly and severally assessed a civil penalty in the amount of Three Thousand Five Hundred Dollars ($3,500.00).

The provisions of this order shall become effective on the sixth day after this decision becomes final. Copies hereof shall be served upon the parties.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice (7 C.F.R. § 1.130 *et seq.*).

[This Decision and Order became final November 21, 1988, as to Respondents HGS Corp. and Otto Gaitber.--Editor.]

In re: BILLY MONK.
P&S Docket No. D-88-39.
Decision filed September 15, 1988.

Failure to maintain an adequate bond - Admission of material allegations.

Edward M. Silverstein, for Complainant.
Respondent, pro se.
Decision issued by Victor W. Palmer, Chief Administrative Law Judge.

DECISION AND ORDER

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 C.F.R. § 201.1 *et seq.*) by engaging in the business of a dealer, buying and selling livestock in commerce for his own account, without maintaining an adequate bond or its equivalent as required by the Act and the regulations. A copy of the complaint was served on respondent who filed an answer thereto admitting all of the material allegations therein. Subsequent thereto, pursuant to section 1.139 of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary (7 C.F.R. § 1.139), complainant moved for the issuance of a decision based upon respondent's admissions in his answer. Since it appears that respondent has not denied the jurisdictional allegations in the complaint and since he admits operating subject to the Act without maintaining an adequate bond or its equivalent as required by the Act and the regulations, the following Decision and Order is issued without further investigation or hearing, pursuant to the aforementioned section 1.139 of the Rules of Practice.

Findings of Fact

1. Billy Monk, doing business as J&H Cattle Co., hereinafter referred to as the respondent, is an individual whose business mailing address is P.O. Box 128, Stephenville, Texas 76401.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account. Such registration has been inactive since November 24, 1986.

3. Respondent was notified by certified mail received August 24, 1987, that it was necessary for him to obtain a $10,000.00 surety bond to secure the performance of his livestock operations under the Act before engaging in business subject to the Act. Respondent was further notified that if he continued his livestock operations under the Act without adequate bond coverage or its equivalent, he would be in violation of section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations. Notwithstanding such notice, respondent continued to engage in the business of a dealer buying and selling livestock in commerce for his own account without maintaining an adequate bond or its equivalent as required by the Act and the regulations.

Conclusions

In his answer, respondent has not denied the jurisdictional allegations made in the complaint. His failure to deny those allegations compels a conclusion that he admits them. *See* 7 C.F.R. § 1.136(c). In any event, because he admits engaging in the business of buying livestock, we would have to conclude that he is operating subject to the Act and the regulations. Respondent also admits in his answer that he was operating subject to the Act and the regulations without maintaining an adequate bond or its equivalent as required by the Act and the regulations. It is found further that the sanctions sought by complainant are appropriate in the circumstances. Accordingly, the following order is issued.

Order

Respondent Billy Monk, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until he complies fully with the bonding requirements under the Act and the regulations. When

respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Five Hundred Dollars ($500.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Pursuant to the Rules of Practice governing proceedings under the Act, this decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145).

Copies hereof shall be served upon the parties.

[This decision became final October 29, 1988.--Editor.]

In re: M&R LIVESTOCK, INC., WARREN H. SHRUM, LOUIS J. WENDLING, ROY B. BARKDULL and JOE L. BARKDULL.
P&S Docket No. 6744.
Order filed October 3, 1988.

Peter V. Train, for Complainant.
Willis K. Kunz, Indianapolis, IN, for Respondent.
Order issued by Victor W. Palmer, Chief Administrative Law Judge.

ORDER MODIFYING THE DECISION AS TO M&R LIVESTOCK, INC.

For Good Cause Shown, and at the request of the parties, the decision as to M&R Livestock, Inc. dated February 1, 1988, is hereby modified to assess a civil penalty of $9,166.65. The order shall remain in effect in all other respects.

In re: ROBERT E. PARCHMAN, VIRGIL R. (RAY) LEMONS, and JACK E. HAMILTON.
P&S Docket No. 6602.
Order filed October 24, 1988.

Edward Silverstein, for Complainant.
Daniel W. Olsen, Kansas City, MO, for Respondents.
Order issued by Donald A. Campbell, Judicial Officer.

REMOVAL OF STAY ORDER

The stay order previously issued in this proceeding pending the outcome of proceedings for judicial review is hereby lifted. The civil penalty and suspension provisions of the order previously filed on May 28, 1987, shall become effective on the 30th day after service of this order on respondents.

In re: PAUL RODMAN and PAUL DAVID RODMAN.
P&S Docket No. 6607.
Order filed October 18, 1988.

Eric Paul, for Complainant.
Gerard D. Eftink, Kansas City, MO, for Respondent.
Order issued by Donald A. Campbell, Judicial Officer.

STAY ORDER

The suspension provisions of the order previously issued in this case are hereby stayed pending the outcome of proceedings for judicial review.

The cease and desist provisions shall remain in effect.

In re: EDWARD TIEMANN.
P&S Docket No. 6780.
Decision and Order filed October 20, 1988.

Failure to maintain adequate bond - Failure to pay - Mitigating circumstances - Sanction policy.

The Judicial Officer reversed Judge McGrail's sanction, substituting the more severe sanction requested by complainant. The Judicial Officer ordered respondent to cease and desist from engaging in business without filing and maintaining an adequate bond or its equivalent; from issuing checks drawn on insufficient funds for payment for livestock; from failing to pay when due for livestock purchases; and from failing to pay for livestock purchased. The Judicial Officer also auspended respondent for 5 years, provided that after 180 days, the suspension may be terminated if respondent demonstrates that all unpaid livestock sellers have been paid in full and that he is in compliance with the bond requirements. Also, after 180 days, the order may be modified to permit respondent's salaried employment by another registrant. Operating without the required bond is an unfair and deceptive practice. Issuing insufficient funds checks is in violation of the Act. Failure to pay, when due, the full purchase price of livestock is an unfair and deceptive practice. Respondent's claimed mitigating circumstances are not sufficient to warrant reducing the sanction requested by complainant. If a seller agrees to accept less than full and prompt payment, where there was no such agreement prior to the payment violation, that does not constitute full and prompt payment. It is the duty of P&S to stop unlawful practices in their incipiency. Severe sanction policy summarized.

Sharlene Lassiter, for Complainant.
Carl Dudensing, Houston, TX, for Respondent.
Initial decision issued by Edward H. McGrail, Administrative Law Judge.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), and the regulations promulgated thereunder by the Secretary of Agriculture (9 C.F.R. § 201.1 *et seq.*).*** An initial Decision and Order was filed on January 13, 1988, by Administrative Law Judge Edward H. McGrail (ALJ) ordering respondent to cease and desist from engaging in business without filing and maintaining an adequate bond or its equivalent; from issuing checks drawn on insufficient funds for payment for livestock; from failing to pay when due for livestock purchases; and from failing to pay for livestock purchased. The order also suspends respondent as a registrant under the Act for 2 years, but provides for a 90-day suspension period if respondent demonstrates to the Packers and Stockyards Administration (P&SA) that all unpaid livestock sellers have been repaid in full, and that respondent has filed and is maintaining a reasonable bond. Moreover, the order allows respondent after 90 days to ask the P&SA to seek modification of the order to allow respondent to be a salaried employee of another registrant.

On February 18, 1988, complainant appealed to the Judicial Officer, to whom final administrative authority has been delegated to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).**** The case was referred to the Judicial Officer for decision on March 30, 1988.

Based upon a careful consideration of the entire record, the initial Decision and Order is adopted as the final Decision and Order in this case, with one major exception. The sanction ordered by the ALJ is reversed, the sanction originally sought by complainant is substituted therefor, and the ALJ's Decision and Order is modified accordingly, with omissions noted by ". . ." and additions by "[]." Also, the effective date of the order is changed in view of the appeal. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

***See generally* Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 Davidson, Agricultural Law, ch. 3 (1981 and 1987 Cum. Supp.), and Carter, *Packers and Stockyards Act*, in 10 Harl, Agricultural Law, ch 71 (1980).

****The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program) (December 1962-January 1971).

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) ("Act"), instituted by complaint filed on October 31, 1986, by the Administrator, Packers and Stockyards Administration, U.S. Department of Agriculture (USDA). The complaint alleged willful violations of the Act and the regulations promulgated thereunder (9 C.F.R. § 201.1 *et seq.*).

Specifically, it is alleged that on or about August 30, 1985, respondent engaged in the business of a dealer, buying and selling livestock in commerce for his own account, without maintaining an adequate bond or its equivalent as required by the Act and the regulations; that in connection with his operation, on or about the dates cited in the complaint and in numerous other transactions, purchased livestock and in purported payment, issued checks which were returned unpaid by the bank upon which they were drawn because there were insufficient funds in the account; . . . that on the dates cited in the complaint, respondent purchased livestock and failed to pay, when due, the full purchase price of the livestock [; and that respondent failed to pay for livestock].

By answer, filed December 1, 1986, respondent generally denied the substantive allegations of the complaint, and stated the instruments issued in payment of the livestock were not to be considered as checks but rather as notes given for the livestock.

An oral hearing was held on September 10, 1987, in Austin, Texas, before the undersigned. Respondent was represented by Myra A. McDaniel, Esq., and Katie Bond, Esq. Complainant was represented by Sharlene Lassiter, Esq., Office of the General Counsel, U.S. Department of Agriculture, Washington, D.C. Official notice was taken at the hearing of the following: *In re Edward Tiemann*, P. & S. Docket No. 4633, Consent Order, May 15, 1972, 31 Agric. Dec. 631 (1972); *United States of America v. Edward Tiemann*, Civil No. A-74- CA-160 (USDC, Western District of Texas) (Nov. 6, 1975) [attached as Appendices A and B, respectively]. (Tr. 118)[1]

Briefs were filed by the parties, complainant on October 30, 1987, and by respondent on November 23, 1987. Such briefs have been duly considered.

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[1] Reference to exhibits are designated "CX" and "RX" to indicate those submitted by complainant and respondent, respectively. References to the hearing transcript are designated "Tr.".

Findings of Fact

1. Respondent Edward Tiemann is an individual whose mailing address is Route 1, Box 103A, Brenham, Texas 77833. (Comp. Para. 1; CX-1)

2. Respondent is, and at all times material herein, was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

3. Respondent was advised by letter dated August 4, 1980, that his bond would be terminated on August 30, 1980. Respondent was also advised that continuation of his operations as a dealer without adequate bond or its equivalent would be a violation of section 312(a) of the Act and sections 201.19 and 201.30 of the regulations promulgated thereunder. (CX-1, 4; Tr. 11-12, 18-19, 64) His registration as a dealer was rendered inactive on January 1, 1981.

4. As of the date of oral hearing, September 10, 1987, respondent had still not obtained a bond as required by the Act, nor do the records of the Packers and Stockyards Administration, USDA, show that respondent is presently registered as [an active] dealer. (Tr. 11, 63-64, 100-101, 110, 114)

5. Respondent attended weekly livestock sales at Smithville Livestock Commission Co., Inc., on October 2, 9, 16, 23, 1985, where he purchased 22, 27, 28 and 30 head of livestock, respectively, and issued checks for their purchase. (CX-2, pp. 8, 25, 39, 45; Tr. 62-64)

6. Respondent attended weekly livestock sales at Four County Auction Center, Inc., on October 8, 15, 1987, where he purchased 87 and 33 head of livestock, respectively, and issued checks for these purchases. (CX-2, pp. 1, 20, 32; Tr. 23-26, 62-63)

7. Respondent, in connection with his operations as a dealer, on or about the dates and in the transactions set forth below, issued checks which were returned unpaid by the bank on which they were drawn because respondent did not have sufficient funds on deposit and available in the account upon which such checks were drawn:

Date 1985	Check Issued To	No. of Head	Amt. of NSF Checks
Oct. 2	Smithville Lvstk. Comm. Co., Inc.	22	$ 5,493.36
Oct. 8	Four County Auction Ctr., Inc.	87	$19,752.57
Oct. 9	Smithville Lvstk. Comm. Co., Inc.	27	$ 7,258.01

Oct. 15	Four County Auction Ctr., Inc.	33	$ 6,860.30
Oct. 16	Smithville Lvstk. Comm. Co., Inc.	28	$ 7,962.93
Oct. 23	Smithville Lvstk. Comm. Co., Inc.	30	$ 7,438.17
	Totals	227	$54,765.34

(CX-2, pp. 1, 8, 20, 25, 32, 39, 45)

8. Respondent, on the dates and in the transactions set forth in Finding No. 7, and in the following transaction, purchased livestock and did not pay, when due, the full purchase price of such livestock (CX-3; Tr. 17):

Date of Purchase	Seller	No. of Head	Amount
Oct. 30, 1985	Smithville Lvstk. Comm. Co., Inc.	16	$4,329.13

9. Respondent and his wife executed a note in the amount of $33,000 in favor of Smithville Livestock Commission Co., Inc., whereby respondent agreed to pay off his indebtedness in installments of $563.91 or more each month. To secure the note, respondent executed a Deed of Trust granting to Smithville Livestock Commission Co., Inc., a secondary lien on respondent's property. Although the Deed of Trust was executed on January 1, 1986, the promissory note was not executed until August 13, 1986. (CX-5; RX-3, 4; Tr. 52-56, 69, 74, 76-77, 80)

10. In September 1986, respondent initially made a payment to Four County Auction Center, Inc., of approximately $11,000 and arranged to pay off the remainder of his indebtedness in installments. Respondent commenced payment under this arrangement on September 23, 1986. (RX-1, 2; Tr. 32-35, 41)

11. As of September 10, 1987, there remained unpaid a total of $23,233.08 owed to Smithville Livestock Commission Co., Inc., and a total of $3,733.85 owed to Four County Auction Center, Inc. (RX-2; Tr. 35-36, 49) [This constitutes failure to pay for livestock as charged in the complaint.]

12. Official notice has been taken of *In re Edward Tiemann*, P. & S. Docket No. 4633, Consent Order, May 15, 1972, 31 Agric. Dec. 631 (1972). In that Consent Order, respondent was ordered to cease and desist from

issuing checks in purported payment for livestock purchased in commerce without having and maintaining sufficient funds on deposit in the bank account upon which they were drawn to pay such checks; and failing to pay, when due, the full purchase price of livestock purchased in commerce.

13. Official notice was also taken of *United States v. Edward Tiemann*, Civil No. A-74, CA-160 (USDC, Western Dist. of Texas) (Nov. 6, 1975) wherein the court found that subsequent to the Consent Order (31 Agric. Dec. 631) respondent knowingly failed to obey its provisions, levied a fine of $500.00 against the respondent, and permanently enjoined respondent from violations of the Consent Order.

Discussion and Conclusions

Operating Without Bond

By letter dated August 4, 1980, respondent was given written notice by the regional office of the Packers and Stockyards Administration that his bond would terminate on August 30, 1980, and that if he continued to operate as a dealer without adequate bond coverage he would be in violation of the cited sections of the Act and the regulations.

Respondent testified that after he discontinued his bond coverage he did not buy livestock for several years; that he commenced buying livestock again in the period 1984-1985; that he was not covered by a bond, or its equivalent, when he made livestock purchases in October 1985; and that he realized he was required to have adequate bond coverage as required by the regulations. In view of these admissions, as well as the receipt by respondent of the "warning letter" of August 30, 1980, it can only be concluded that respondent was in continuous and willful violation of the Act. The fact that respondent believed other dealers were operating without bond and therefore he was not required to have one is of no consequence.

It has long been established that failure to obtain and maintain an adequate bond or its equivalent, as required by the Act and the regulations, is an unfair and deceptive practice in willful violation of section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations (9 C.F.R. §§ 201.29, 201.30). *In re Mid-West Veal Distributors*, 43 Agric. Dec. 1124 (1984); *In re Norwich Veal and Beef, Inc.*, 38 Agric. Dec. 214 (1979); *In re Hoth*, 36 Agric. Dec. 1812 (1977).

It has also been held that a prohibited action is willful if done intentionally or with careless disregard of statute or regulatory requirements. *In re Farrow*, 42 Agric. Dec. 1397, 1433 (1983), [*aff'd in part and rev'd in part*, 760 F.2d 211 (8th Cir. 1985)], and cases cited therein.

Failure to Pay - Issuance of NSF Checks

The record discloses that on at least six different occasions in October 1985, respondent made purchases of livestock from two different livestock markets and issued checks in payment thereof which were returned unpaid because there were insufficient funds in the account upon which they were

drawn. Although respondent testified that at the time he issued the checks there were sufficient funds in his account to cover them, the fact remains that at the time such checks reached the bank there were insufficient funds in the account to cover them. Thus, they were returned unpaid.

Although respondent has, and is in the process of making payments to the sellers of livestock, as of the date of hearing there remained unpaid a total of $23,233.08 owed to Smithville Livestock Commission Co., Inc., and a total of $3,733.85 owed to Four County Auction Sales, Inc. [This constitutes failure to pay for livestock. Also,] failure to pay, when due, is an unfair and deceptive practice because in the absence of a written agreement before the purchase, the seller has the right to expect full payment for livestock no later than the close of the next business day. The effect on a livestock market when a dealer fails to pay for livestock, or issues checks in payment for livestock which are returned unpaid because of insufficient funds, causes serious problems for those in the livestock trade. The livestock market must replace funds in its custodial account with its own funds. If a livestock market does not have its own funds to place in the custodial account, it is caused to borrow funds to cover the sale. [Failure to pay is the most serious violation contained in the complaint.]

Prior to January 1986, Smithville Auction Market, Inc., was losing money, was overdrawn in its accounts and its custodial account was in financial straights. This situation caused it to close down its operations during the period April-July 1986. Although not shown in the record, the failure to pay, when due, and the issuance of insufficient funds checks may well have contributed to the failing financial situation of Smithville Auction Market, Inc., and causing it to temporarily close down its operation. Such conduct by respondent undermines the integrity and [viability] of the livestock industry. [Moreover, respondent has failed to pay *at all* for much of the livestock, which is most serious.]

Failure to pay, when due, the full purchase price of livestock constitutes an unfair and deceptive practice in willful violation of sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228(b)). *In re Richard N. Garver*, 45 Agric. Dec. 1090, 1095 (1986) [, *aff'd*, 846 F.2d 1029 (6th Cir. 1988), *cert. denied*, 57 U.S.L.W. 3230 (U.S. Oct. 3, 1988) (No. 87-1923)]; *In re Mid-West Veal Distributors, supra*; *Lewis v. Butz*, 512 F.2d 681-682 (8th Cir. 1975); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 561-562 (1977), *aff'd sub nom. Van Wyk v. Bergland*, 570 F.2d 701, 704-705 (8th Cir. 1978). *Bowman v. U.S.D.A.*, 363 F.2d 81, 85 (5th Cir. 1966).

As stated in *In re Milton Bryan*, 36 Agric. Dec. 37, 42 (1977):

> The Secretary has long held that the issuance of insufficient fund checks or drafts in payment for livestock whether or not the checks or drafts are later made good constitutes an unfair and deceptive practice

in violation of section 312(a) of the Act (7 U.S.C. 213(a)) (citations omitted).

Additionally, the issuance of insufficient fund checks has been held to be in willful violation of section 409 of the Act (7 U.S.C. 228b). *In re Richard N. Garver, supra*, and cases cited therein; *In re Cattleman's Commission Company*, 45 Agric. Dec. 23[4], 249 (1986); *In re Edzards*, 37 Agric. Dec. 1880, 1887 (1978).

[It is well-settled that failure to pay, in whole or in part, is an unfair and deceptive practice (e.g., as charged in the complaint, herein) which causes issuance of suspensions of up to 5 years. This was stated in *In re Farmers & Ranchers Livestock Auction, Inc.*, 44 Agric. Dec. 1973, 1986-87 (1985), as follows (emphasis added):

> Checks drawn in purported payment for two of these purchases were dishonored upon presentation because sufficient funds were not on deposit and available (Finding 17). These failures to pay, when due, the full purchase price of livestock constitute an unfair and deceptive practice in wilful violation of sections 312(a) and 409 of the Act (7 U.S.C. 213(a), 228b). *Lewis v. Butz*, 512 F.2d 681, 682-83 (8th Cir. 1975); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 561-62 (1977), *aff'd sub nom, Van Wyk v. Bergland*, 570 F.2d 701, 704-05 (8th Cir. 1978); *Bowman v. U.S.D.A.*, 363 F.2d 81, 85 (5th Cir. 1966). *When registrants fail to pay for livestock purchases, in whole or in part, suspensions up to 5 years may be issued.* See *In re Mid-States Livestock, Inc., supra* at 549-51. *The unpaid livestock seller in this case was fortunate to recover all but $8,330.86 of the total purchase amounts from clause 2 dealer bonds required by the Secretary* (Finding 19; Complainant's Exhibits 31, 31A). *These actions, however, remain serious violations that call for the imposition of a substantial period of suspension.*]

Sanction

Complainant here seeks a five (5) year suspension of respondent's registration as a registered dealer subject to the Act and the regulations, with the proviso that the suspension be lifted at any time after 180 days upon demonstration by respondent that his outstanding debts have been paid.

From the previous actions taken against respondent for past violations, as well as the receipt of the "warning letter" in 1980, it is clear that respondent was aware of the requirements of the statute and the regulations when he operated without bond, issued insufficient funds checks, and failed to make payment, when due [, for livestock, and failed to pay for livestock].

However, the record shows that creditable payments were made to Smithville Livestock and that respondent continues to make monthly payments to further reduce the amount of $23,233.08 owed to Smithville Livestock

Commission Co. at the time of the hearing. Respondent has also given Smithville a note in the amount of $33,000 secured by a Deed of Trust for property owned by respondent.

With regard to Four County Auction Center, Inc., the original amount owed was $26,612.87. Respondent commenced making payments on this debt in September 1986 with an initial payment of $11,000. Respondent has been making regular payments since then by turning over his weekly sales commission checks to Four County. Four County has been satisfied with this repayment arrangement. As of the date of oral hearing, $3,733.85 was still due and owing to Four County.

The courts have long held that good faith should not be a defense to a civil penalty action, and that it should be a factor only in determining the penalty imposed. *United States v. Ancorp National Service, Inc.*, 516 F.2d 198, 202 (2nd Cir. 1975); *United States v. Beatrice Foods, Co.*, 493 F.2d 1259, 1275 (8th Cir. 1974), *cert. denied*, 420 U.S. 961 (1975); *United States v. H. M. Prince Textiles*, 262 F. Supp. 383, 388 (S.D.N.Y. 1966).

However, making application for bond coverage after operating in violation of statutory requirements is not a mitigating circumstance to warrant reduction of a sanction. [T]he fact that the auction markets may suffer, in the event respondent is not able to make full restitution, [also does not] provide mitigating circumstances to warrant reduction of a sanction, since the national interest of having fair and competitive conditions in the agricultural industries must prevail over the local interests which might be temporarily damaged as a result of a suspension order. *In re Mayer*, 43 Agric. Dec. 439, 445 (1984) [(decision as to respondent Doss), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984)]; *In re Garver, supra*.

. . . The original amount owed to both markets exceeded $59,000 (Finding Nos. 7, 8). As of the date of oral hearing, this amount was reduced to less than $27,000 (Finding No. 10). Although not part of the hearing record, it must be acknowledged that documents submitted as attachments to respondent's brief show that on November 10, 1987, respondent made a final payment to Four County Auction Center. Thus, respondent is no longer indebted to that market. Additionally, the amount still owed to Smithville Livestock Commission Co., Inc., is covered by a $33,000 note which is secured by a Deed of Trust granting that market a secondary lien on respondent's property. [While these payments are good news for the creditors, they are not sufficiently mitigating to reduce the sanction from that recommended by complainant.]

As reflected in *In re Samuel Esposito*, 38 Agric. Dec. 613, 633 (1979), different degrees of seriousness of violations are recognized by the Judicial Officer. Further, that mitigating circumstances are always considered in determining the sanction to be issued and may be grounds for imposing a lesser sanction. It is noted here that similar violations to those found here

have warranted a two-year suspension (see e.g., *In re Richard N. Garver, supra*), whereas the more stringent suspension of 5 years has been assessed for multi-violations. See e.g., *In re Farmers & Ranchers Livestock Auction, Inc.*, 45 Agric. Dec. 234 (1986) (failure to pay - NSF checks and check kiting - incomplete records containing false and deceptive entries - misusing custodial accounts). [Respondent's violations are the third time he has been charged for payment violations, which most recently were committed while under permanent injunction for these almost identical violations--a most serious situation.]

I therefore find that a suspension of [5] years with the proviso that the suspension be lifted at any time after [180] days upon demonstration that respondent's debts have been paid will serve as an effective deterrent to future similar violations by respondent and others.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Complainant appeals the sanction herein, because the ALJ found mitigating circumstances which prompted the ALJ to reduce by about one-half complainant's requested sanction. Respondent replies that he "feels that the penalty imposed for the *insignificant* violations of the acts committed is adequate, fair and just" (Respondent's Reply to Complainant's Objections to Judicial Order (March 29, 1988, 3rd unnumbered page) (emphasis added)).

Thus, the only issue presented is whether the ALJ's sanction should be increased. I find that the circumstances relied upon by the ALJ are not sufficiently mitigating to support reduction of the sanction requested by complainant, for the reasons below. Moreover, the ALJ erred in giving no more than passing attention to the most serious violation herein, failure to pay. As will be shown below, promissory notes, extended payment plans, and self-serving statements of good faith do not mitigate failure to pay circumstances, and cannot exculpate respondent from a blatant failure to pay.

Frankly, none of the circumstances of this case strikes me as particularly mitigating. In fact, respondent has been disciplined twice in the past for similar violations, in 1972 and 1975 (Findings 12 and 13, respectively) (also, see Appendices A and B, respectively). Respondent's position on mitigation is inconsistent in a number of ways with the facts.

For instance, respondent basically testified that a suspension of sales commissions would be completely, financially devastating because he relies on his cattle business (Tr. 106). However, when respondent's bond was terminated on August 30, 1980, and his dealer registration became inactive as of January 1, 1981 (Finding 3), respondent says that he did no cattle business for several years (Initial Decision, *supra*, at 7). Respondent cannot have it both ways on this point, choosing to absent himself from the business when it suited him, but returning to cattle sales, without bond, 3 years later. Moreover, this 3- or 4-year hiatus is not wholly consistent with the allegedly crucial importance respondent ascribes to his cattle sales business, economic conditions notwithstanding.

Consequently, although the fact is of no importance here, there is cause to wonder whether respondent absented himself from this business during the period 1981-1984. Nevertheless, his reasons for returning and committing much the same violations as in 1972 and 1975--if it is true that it happened this way--are not mitigating. For this analysis, I must presume that respondent's reliance on "bad economic conditions" causing his recent violations means that "bad economic conditions" were not the cause in 1972 and 1975, or there would be no discernable difference between 1985's violations, and the earlier ones, where the respondent received sanctions from the Department, and a permanent injunction and a $500 fine issued by a U.S. District Court, respectively.

But, "bad economic conditions" alone are not mitigating, in any event. On the contrary, the bad economic conditions relied upon by respondent for mitigation would have prompted a prudent dealer to secure a proper, lawful bond, or otherwise increase the dealer's existing bond, rather than go bare, as respondent did, and put others in the industry illegally and unlawfully at financial risk. Respondent seems to believe that bad economic conditions only apply to him.

Moreover, respondent's stated reason for insufficient funds (that a debtor died owing respondent $21,000, which allegedly was uncollectable out of the debtor's estate) is disingenuous. A $21,000 discrepancy cannot explain why respondent failed to pay, when due, for $59,084.47 in livestock purchases, and failed to pay for livestock totaling $26,971.05 at the start of the hearing on September 10, 1987 (Finding 11).

Respondent's demonstrated attitudes, concerning the maintenance of a proper bond in a highly-regulated industry, are instructive. Respondent's own testimony is that he could have secured a bond, but did not want to part with a $350 premium, because unnamed others (allegedly) did not have bonds. Respondent apparently believes the compulsory bond requirement is really discretionary, when he testified, as follows (Tr. 111-13) (emphasis added):

> BY MS. LASSITER:
>
> Q. Well, let's move on to something else. You said that regarding the bond coverage -- you stated that you saw that people around you did not have bond coverage and you figured that you didn't need bond coverage. Is that what you testified to?
>
> A. No. I am not saying I didn't need bond coverage. *I just stated that if they were operating without a bond, and I have to take $350 out of mine to obtain -- keep my bond, I feel that they should have to have one too.*

Q. Okay. But did you ever receive notice from the Packers and Stockyards Administration which told you that you could allow your bond to lapse and not maintain bond coverage?

A. No, I didn't get that. But when I dropped my bond, I didn't buy cattle for a couple of years.

Q. But --

A. I quit the business.

Q. But you did purchase livestock in 1985. Right?

A. I started back probably in '84, -5. Yes.

Q. And you did sell that livestock -- to -- at -- either at other auction markets or to other purchasers?

A. Yes.

Q. And before you bought and sold the livestock in 1985, you did not have a bond. Is that right?

A. No.

Q. You did have a bond?

A. No.

Q. You did not have a bond. That is what I am --

A. No.

Q. Okay. And did you in 1980 receive notice from the Packers and Stockyards Administration that your bond coverage was lapsing and that you would have to obtain bond coverage before you entered into the business again. Isn't that true?

A. No.

Q. Isn't it true that you previously testified as to Complainant's Exhibit Number 4, which is the notice which you received, which you gave you the notice that you had to receive bond coverage?

MS. MCDANIEL: Why don't you refresh your memory by --

THE WITNESS: *Yes. I remember it. But I had to. But I dropped my bond, because I didn't want to have it any more. It wasn't because I couldn't get it. It was because I didn't want it anymore.*

It weighs very heavily in this proceeding that respondent's testimony and attitudes are delivered after he has received prior sanctions from the Department for similar violations, and *is under a permanent injunction to cease and desist from doing just that which he is charged herein with doing.* Respondent is not appealing the ALJ's findings that he committed these violations; rather, respondent deseribes them as "insignificant" violations (Respondent's Appeal, *supra*). Respondent is incorrect, because these are serious violations, for the reasons below.

It is plain that respondent could not be more familiar with the requirements of the Act and the regulations. Yet, respondent consistently chooses to violate the Act and the regulations. To my mind, it is hard to conceive of a pattern of conduct which would be closer to what the Act and the regulations seek to prevent than respondent's conduct herein, and his past pattern of violations.

As described in the testimony of Bob Smith, the P&SA expert witness, failure to maintain an adequate, required bond is an unfair and deceptive practice, because the sellers of livestock have a right to expect that respondent has the required coverage, and that the registrant has a secondary source of payment, as follows (Tr. 83):

BY MS. LASSITER:

Q. Okay. Are you familiar with the bonding requirements of the Act?

A. Yes, ma'am.

Q. Does the Packers and Stockyards Administration take a position with regard to a dealer who fails to provide bond coverage?

A. Yes. Operating without bond coverage is an unfair and deceptive practice.

Q. And why is it unfair and deceptive?

A. The firms from whom the dealer purchases livestock has the right to expect that the registrant has the required bond coverage when they purchase the livestock.

Q. Any why is bond coverage important?

A. Because it is a secondary source of payment in the event that the principal does not make payment for the livestock.

If ever there were sellers of livestock who need a secondary source of payment to protect them, those sellers dealing with respondent need a protective bond. This is the *third* time that this respondent is up on charges for failure to pay, when due, for livestock, and for uttering checks for payment therefor based upon insufficient funds. However, this respondent still does not grasp the nature of the seriousness of the charges against him. My belief in this regard is based upon a reading of the entire record, but ironically these reasons are summarized in Respondents Reply, *supra*, at the 2nd and 3rd unnumbered pages, as follows:

> The record is complete that Respondent has either discharged or is discharging by payment to Smithville Livestock Commission Co. and Four County Auction Center, Inc., all obligations previously owed to these business establishments. The evidence also shows that Respondent has made application or is presently making application to be bonded for such activity. The record additionally shows that no one has been financially damaged as a result of the unfortunate conduct of Respondent prior to this time. The record amply illustrates that the Respondent has been in "good faith" prior to this time even though unfortunate economic circumstances have put him in a very perilous position. Even with the bad economic times, Respondent has in all manner acted in "good faith" regarding his obligations and business dealings. There are many mitigating circumstances present in this matter. Due to the economic situations existing in the area of the country in which Respondent was doing business and the unfortunate activities of third parties, not a party to this matter, Respondent had in the past found himself in an economic-legal dilemma. However, the record shows that Respondent has in the past, and is presently, extricating himself from such economic dilemma and is in "good faith" discharging all responsibilities that were existing prior to the hearing in this matter. Knowing that all prior obligations will be discharged timely and promptly and that Respondent will secure a bond as required by the Act, there has been no substantial economic damage to any party involved in this matter. There has been no wilful or intentional violations of the Act in this case. All violations of the Act, which were not serious in nature, have been the result of matters and forces not controllable by Respondent herein. We feel the Department and Secretary should consider good faith and mitigating circumstances in determining the penalty herein imposed. Also, the Department and Secretary should consider if Respondent herein has and is correcting

any prior violations made in this matter.

> Is a suspension of two (2) years with a proviso that the suspension be lifted at any time after ninety (90) days upon demonstration that Respondent's debts have been paid and will serve as an effective deterrent to future similar violations by Respondent and others? Respondent feels that the penalty imposed for the insignificant violations of the acts committed is adequate, fair and just.

All of the above points are offered by respondent in mitigation of the nction, but, I find these points either unbelievable, untrue, completely lf-serving, or, even if true, not sufficiently mitigating. As one examines these ints, it must be kept in mind that failure to pay for livestock is a serious olation of the Act, and Mr. Smith, the P&SA witness, testified that failure pay is the most serious violation in this case (Tr. 86). Against that fact, an amination of these supposed mitigating facts is revealing.

Respondent makes much of his repayment plans with Smithville and Four ounty. Claiming "good faith," respondent even convinced the ALJ to itigate the failure-to-pay violation, presumably because the respondent was ogressing toward repayment. My view is that respondent's agreements with s two creditors are not particularly mitigating. Also, the creditors knew the spondent quite well, and presumably knew of respondent's assets: land, a ailer park, and convenience store. Respondent is deemed to have known at these assets were at risk for its debts. Moreover, the docking of spondent's "pay" by Four County is not particularly mitigating, either, ecause respondent could not continue to operate there without this rangement, and faced bankruptcy, or a lawsuit, otherwise.

Furthermore, it is well-settled that where a seller agrees to accept less than ll and prompt payment, where there was no such agreement prior to the ayment violation, that does not constitute full and prompt payment, and does ot negate a violation of the Act.[2]

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[2] See *In re A. Pellegrino & Sons, Inc.*, 44 Agric. Dec. 1602, 1603 n. 1 1985), *appeal dismissed*, No. 85-1590 (D.C. Cir. Sept. 29, 1986); *In re Finer oods Sales Co.*, 41 Agric. Dec. 1154, 1163-65 (1982), *aff'd*, 708 F.2d 774, 782 D.C. Cir. 1983); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1136 1981); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 404 (1981), *ff'd*, 668 F.2d 983 (8th Cir.), *cert. denied*, 456 U.S. 1007 (1982); *In re Kafesak*, 9 Agric. Dec. 683, 685 (1980), *aff'd*, 673 F.2d 1329 (6th Cir. 1981) unpublished), *reprinted in* 41 Agric. Dec. 88 (1982); *In re Baltimore Tomato o.*, 39 Agric. Dec. 412, 413-14 (1980); *In re Hal Merdler Produce, Inc.*, 37 (continued...)

Thus, I believe the ALJ gave too much weight to promissory notes, promises, "good faith" efforts, and payment plans. When the date of the hearing occurred, with payment not made, the respondent had *failed to pay.* Complainant argued unsuccessfully to the ALJ (Complainant's Statement of Position (November 23, 1987)) that respondent's arguments supporting mitigation should not even have been considered, coming, as they did, unsworn, unsubstantiated, and after the hearing had closed. Complainant is probably right that the extraneous information should not have been allowed. However, the only issue before me concerns mitigating circumstances, and this information clarifies such. Since the "mitigating" facts turn out not to be particularly mitigating, complainant's case is not really hurt by these admissions. Since these mitigating facts are not particularly mitigating, the point is moot.

It is well-settled that failure to pay, in whole or in part, is an unfair and deceptive practice (e.g., as charged in the complaint, herein) which causes issuance of suspensions of up to 5 years. This was stated in *In re Farmers & Ranchers Livestock Auction, Inc.*, 44 Agric. Dec. 1973, 1986-87 (1985), as follows (emphasis added):

> Checks drawn in purported payment for two of these purchases were dishonored upon presentation because sufficient funds were not on deposit and available (Finding 17). These failures to pay, when due, the full purchase price of livestock constitute an unfair and deceptive practice in wilful violation of sections 312(a) and 409 of the Act (7 U.S.C. 213(a), 228b). *Lewis v. Butz*, 512 F.2d 681, 682-83 (8th Cir. 1975); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 561-62 (1977), *aff'd sub nom, Van Wyk v. Bergland*, 570 F.2d 701, 704-05 (8th Cir. 1978); *Bowman v. U.S.D.A.*, 363 F.2d 81, 85 (5th Cir. 1966). *When registrants fail to pay for livestock purchases, in whole or in part, suspensions up to 5 years may be issued.* See *In re Mid-States Livestock, Inc., supra* at 549-51. *The unpaid livestock seller in this case was fortunate to recover all but $8,330.86 of the total purchase amounts from clause 2 dealer bonds required by the Secretary* (Finding 19; Complainant's Exhibits 31, 31A). *These actions, however, remain serious violations that call for the imposition of a substantial period of*

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[2](...continued)
Agric. Dec. 809, 810 (1978); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1633, 1639-40 (1976), *aff'd mem.*, 568 F.2d 772 (4th Cir.), *cert. denied*, 439 U.S. 819 (1978); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1884-87 (1975); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 733-40 (1975), *aff'd mem.*, 549 F.2d 830 (D.C. Cir.), *cert. denied*, 434 U.S. 920 (1977); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1887-88, 1892, 1896, 1899-1900 (1974), *aff'd*, 524 F.2d 1255, 1258 (5th Cir. 1975).

suspension.

In *In re Garver*, 45 Agric. Dec. 1090, 1101-04 (1986), *aff'd*, 846 F.2d 1029 (6th Cir. 1988), *cert. denied*, 57 U.S.L.W. 3230 (U.S. Oct. 3, 1988) (No. 87-1923), it is explained that 2- to 5-year suspension orders are now issued in the case of serious failures to pay for livestock where 30- to 60-day suspension orders would have been issued in comparable cases a few years ago. The *Garver* case explains the serious nature of failures to pay for livestock, and the need for a very severe sanction in failure to pay cases, as follows (45 Agric. Dec. at 1101-04):

> Respondent's failure to pay for about $700,000 worth of livestock fully justifies the 2-year suspension order requested by complainant. It should be noted that there has been a drastic change in complainant's sanction policy with respect to failure to pay violations in recent years. For many years, a person who deprived a livestock seller of 1% of the value of his livestock by false weighing would be given a more severe sanction than a person who deprived the livestock seller of 100% of the value of his livestock by failing to pay for the livestock. In the latter case, a 30-day suspension order was typical. (I inherited that policy and did not change it during the period I was administrator of the Packers and Stockyards Act regulatory program.)
>
> I suggested a drastic change in that policy in *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547 (1977), *aff'd sub nom. Van Wyk v. Bergland*, 570 F.2d 701 (8th Cir. 1978). In that case, livestock sellers lost over half a million dollars because respondents took money from their livestock business, which was needed to pay sellers, and lost it gambling on the commodity futures market (37 Agric. Dec. at 550). Complainant recommended the usual 30-day "slap on the wrist" suspension order, which was imposed by the ALJ. When *respondent* appealed, I *sua sponte* raised the issue as to whether the sanction should be increased on appeal, and suggested in an order requesting additional briefs that a 5-year suspension order seemed appropriate. In imposing a 60-day suspension order in that case, it is stated (37 Agric. Dec. at 550-51):
>
> > Just last year Congress indicated its concern that livestock producers be paid for their livestock by the enactment of amendments to the Packers and Stockyards Act which impose payment requirements even more stringent than those previously imposed by the regulations issued under the Act (Public Law 94-110, 94th Cong., 2nd Sess.; 90 Stat. 1249). In the House

Report on the bill relating to these amendments, it is stated (H. Rep. No. 94-1043, 94th Cong., 2nd Sess., p. 5; see, also, Sen. Rep. No. 94-932, 94th Cong., 2nd Sess., pp. 5-6):

USDA figures show that in 1973 some $31 billion worth of livestock and $4 billion worth of poultry were marketed in the United States, representing approximately one-third of all farm income. Livestock is probably the single most important source of protein in the American diet. Thus, livestock producers occupy a position of unique national importance. No individual is engaged in a riskier endeavor or one more vital to the national interest than the producer. And no entrepreneur is so completely at the mercy of the marketplace. The livestock producer, if he successfully combats the vicissitudes of weather, financing, skyrocketing costs, etc., must sell when his cattle are ready irrespective of the market. His livestock may represent his entire year's output. And, if he is not paid, he faces ruin. While some may argue that business is business and that farmers must take their chances along with everyone else, this Committee must view the situation from a larger perspective. We would be derelict in our responsibilities to the American people if we failed to address the evils which have inflicted heavy losses upon the very producers upon whom the Nation depends for such an important part of its basic food supply.

In two recent cases involving failure to pay for about $766,000.00 and $3.2 million dollars worth of livestock, respectively (*In re Robert L. Benefiel*, 32 Agr Dec 1684 (1973); *In re James L. Heller*, 34 Agr Dec 1563 (1975)), respondents were suspended for five years. Although these cases are not weighty precedents because one is a consent case and the other a default case, they show, nonetheless, that a 5-year suspension order is at least regarded as appropriate in some failure to pay cases. I believe that the respondents' failure to pay over half a million dollars in the present case warrants a similar 5-year suspension order, particularly since the respondents took the money from their successful livestock business to finance their gambling ventures.

Under a similar regulatory program administered by the Department involving perishable agricultural commodities, a violator's license is routinely revoked for failing to pay a significant amount of money for produce, even where such failure is because of legitimate business losses. See, *e.g.*, *In re Reese Sales Company*, 28 Agr Dec 1150 (1969), affirmed *sub nom. Reese Sales Company v. Hardin*, 458 F.2d 183 (C.A. 9); *In*

re Sam Leo Catanzaro, 35 Agr Dec 26 (1976), [*aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467 (1977)].[6] A revoked licensee may not apply for a new license for two years. 7 U.S.C. 499d(b).

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[6] *Accord In re B.G. Sales Co.*, 44 Agric. Dec. [2021 (1985)] (nonpayment because bank suddenly refused to extend credit as it agreed, and the bank took $50,000 of respondent's funds in the bank's possession); *In re Jarosz Produce Farms, Inc.*, 42 Agric. Dec. [1505 (1983)] (nonpayment because of bankruptcy caused by failure of large purchaser from respondent to comply with its contractual agreement); *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. 1151 (1983) (nonpayment because another firm failed to pay respondent $248,805.66); *In re Bananas, Inc.*, 42 Agric. Dec. 588 (1983) (nonpayment because of a major customer's insolvency, the failure of other debtors to pay respondent, and increased operating costs); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2428, 2442-44 (1982) (nonpayment because of bankruptcy), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1171 (1982) (nonpayment because of bankruptcy), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re Carlton F. Stowe, Inc.*, 41 Agric. Dec. 1116, 1129 (1982) (nonpayment because of bankruptcy of another firm owing respondent $776,459.23), *appeal dismissed*, No. 82-4144 (2d Cir. Oct. 13, 1982); *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 746-47 (1982) (nonpayment because of financial difficulties); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1138-40 (1981) (nonpayment because respondent suddenly and unexpectedly lost a major sales account); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 404 (1981) (nonpayment because of financial difficulties), *aff'd*, 668 F.2d 983 (8th Cir.), *cert. denied*, 456 U.S. 1007 (1982); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 113 (1981) (nonpayment because respondent lost a major sales account and a large supplier changed its course of dealing with respondent, demanding cash on delivery), *aff'd mem.*, No. 81-1446 (D.C. Cir. Jan. 19, 1982), *printed in* 41 Agric. Dec. 89 (1982); *In re Kafcsak*, 39 Agric. Dec. 683, 685-86 (1980) (nonpayment because of strike and failure of others to pay respondent), *aff'd*, 673 F.2d 1329 (6th Cir. 1981) (unpublished), *printed in* 41 Agric. Dec. 88 (1982); *In re John H. Norman & Sons Distrib. Co.*, 37 Agric. Dec. 705, 709-14 (1978) (nonpayment because of failure of others to pay respondent); *In*

re Catanzaro, 35 Agric. Dec. 26, 31 (1976) (nonpayment because of railroad strike), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467; *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 266-68 (1973) (nonpayment because of financial difficulties), *aff'd*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *accord In re Wayne Cusimano, Inc.*, 40 Agric. Dec. 1154, 1157 (1981) (nonpayment because of financial difficulties, including difficulty in collecting from others), *aff'd*, 692 F.2d 1025 (5th Cir. 1982); *In re C.B. Foods, Inc.*, 40 Agric. Dec. 961 (1981) (nonpayment because respondent lost a major sales account and three large suppliers would no longer extend credit), *aff'd mem.*, 681 F.2d 804 (3d Cir.), *cert. denied*, 459 U.S. 831 (1982); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1632-33, 1641-42 (1976) (nonpayment because of financial difficulties), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (unpublished), *cert. denied*, 439 U.S. 819 (1978); *In re Solt*, 35 Agric. Dec. 721, 723-24 (1976) (nonpayment because of bankruptcy of another firm owing respondent over $130,000); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1883, 1885 (1975) (nonpayment because of financial difficulties); *In re Bailey Produce Co.*, 8 Agric. Dec. 1403, 1405 (1949) (nonpayment because of financial difficulties); *In re Josie Cohen Co.*, 3 Agric. Dec. 1013, 1015 (1944) (nonpayment because of financial difficulties).

Although I believe the violations in this case warrant a 5-year suspensi order to serve as an effective deterrent to future similar violations, t complainant, in the oral argument before the Judicial Officer, recommend only a 60-day suspension order. Since it is the policy of the Judicial Offic "never to increase the sanction recommended by the administrative officia (see Appendix, p. 21a), a 60-day suspension order will be issued rather th a 5-year suspension order.

Subsequent to the decision in *Mid-States*, just quoted, the Judicial Offic overruled that portion of the Department's sanction policy which precludc him from imposing a sanction greater than that recommended by t administrative officials (*In re Rowland*, 40 Agric. Dec. 1934, 1952 (1981), *aff'* 713 F.2d 179 (6th Cir. 1983)). Accordingly, if *Mid-States* were to be decide today, a 5-year suspension order would be issued.

The ALJ felt that it would be desirable to permit respondent to continue in the livestock industry with the safeguards that are presently in place. I disagree! It is not desirable to permit respondent to continue in the livestock industry since that would seriously undercut the deterrent value of the administrative sanction imposed in this case. It would encourage respondent and others to act in a similar irresponsible manner in the future, greatly endangering livestock sellers.

The ALJ also indicated that under the proposed arrangement to permit respondent to remain in the livestock business during all but 30 days of the 2-year suspension period, respondent's creditors could receive a "token" repayment of the indebtedness. However, that argument has routinely been rejected in determining sanctions imposed by this Department. It has consistently been held that any hardship to the respondent's creditors, customers, community, or employees which might result from a suspension order is given no weight in determining the sanction since the national interest of having fair and competitive conditions in the livestock and meat industries prevails over the local interests that might be damaged as a result of a suspension order.[7]

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[7] *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. [590 (1986), *aff'd*, 810 F.2d 916 (9th Cir. 1987)]; *In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. [118 (1984)]; *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. 1151, 1172 (1983); *In re Bananas, Inc.*, 42 Agric. Dec. 588, 606 (1983); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2441-42 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Powell*, 41 Agric. Dec. 1354, 1365 (1982); *In re VPC, Inc.*, 41 Agric. Dec. 734, 746 n.6 (1982); *In re Hatcher*, 41 Agric. Dec. 662, 670-71 (1982); *In re Gus Z. Lancaster Stock Yards, Inc.*, 38 Agric. Dec. 824, 825 (1979); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1737-38 (1978); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 302, 311, *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1128-29, 1136 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Red River Livestock Auction, Inc.*, 36 Agric. Dec. 980, 989-90 (1977); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1562 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Catanzaro*, 35 Agric. Dec. 26, 34-35 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467 (1977); *In re Overland Stockyards, Inc.*, 34 Agric. Dec. 1808, 1851-52 (1975); and *see In re L.R. Morris Produce Exch., Inc.*, 37 Agric. Dec. 1112, 1120-21 (1978); *In re Armour & Co.*, 37 Agric. Dec. 109, 112 (1978).

In many of the cases cited in note 6 of *Garver*, quoted above, the PAC creditors "voluntarily" accepted less than 100% of the amount owed i bankruptcy proceedings, and urged the Judicial Officer to impose a ver lenient sanction on the bankrupt violator so that the violator could continu in business. All of such requests for leniency were routinely denied by th Judicial Officer, since the national public interest in deterring simila violations must prevail over the narrow interests of particular creditors (se the cases cited in *Garver*, note 7, quoted above).

In denying the petition for reconsideration in *Garver*, quoted above, it i emphasized that severe sanctions should be imposed in nonpayment cases, even where there was no misbehavior (such as fraud) by the respondent. The decision states (45 Agric. Dec. at 1957-59):

> On August 15, 1986, respondent filed a petition for reconsideration challenging Finding of Fact 11 and arguing that a severe sanction is inappropriate and would have no deterrent effect on respondent or others.

Finding 11, which relates to respondent's sale of property used as security by the bank for its line of credit, and the bank's termination of the line of credit, is fully supported by the record. Moreover, it makes no difference why the bank terminated its line of credit. As stated in the original decision herein, note 2, the "bank's action in withdrawing respondent's line of credit did not cause his loss of at least $700,000 [which is the actual cause of respondent's failure to pay], but merely exposed his insolvent condition."

As to the appropriateness of the sanction, respondent argues that a severe sanction should only be imposed in nonpayment cases where the nonpayment occurred because of fraud. Respondent's argument would, however, emasculate the 1976 payment provisions enacted by Congress. The Act was amended in 1976 to provide (7 U.S.C. § 228b):

> § 228b. Prompt payment for purchase of livestock
>
> (a) Full amount of purchase price required; methods of payment
>
> Each packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and transfer of possession thereof, deliver to the seller or his duly authorized representative the full amount of the purchase price: *Provided*, That each packer, market agency, or dealer purchasing livestock for slaughter shall, before the close of the next business day following purchase of livestock and transfer of possession thereof, actually deliver at the point of transfer of possession to the seller or his duly

authorized representative a check or shall wire transfer funds to the seller's account for the full amount of the purchase price; or, in the case of a purchase on a carcass or "grade and yield" basis, the purchaser shall make payment by check at the point of transfer of possession or shall wire transfer funds to the seller's account for the full amount of the purchase price not later than the close of the first business day following determination of the purchase price: *Provided further*, That if the seller or his duly authorized representative is not present to receive payment at the point of transfer of possession, as herein provided, the packer, market agency or dealer shall wire transfer funds or place a check in the United States mail for the full amount of the purchase price, properly addressed to the seller, within the time limits specified in this subsection, such action being deemed compliance with the requirement for prompt payment.

(b) Waiver of prompt payment by written agreement; disclosure requirements

Notwithstanding the provisions of subsection (a) of this section and subject to such terms and conditions as the Secretary may prescribe, the parties to the purchase and sale of livestock may expressly agree in writing, before such purchase or sale, to effect payment in a manner other than that required in subsection (a) of this section. Any such agreement shall be disclosed in the records of any market agency or dealer selling the livestock, and in the purchaser's records and on the accounts or other documents issued by the purchaser relating to the transaction.

(c) Delay in payment or attempt to delay deemed unfair practice

Any delay or attempt to delay by a market agency, dealer, or packer purchasing livestock, the collection of funds as herein provided, or otherwise for the purpose of or resulting in extending the normal period of payment for such livestock shall be considered an "unfair practice" in violation of this chapter. Nothing in this section shall be deemed to limit the meaning of the term "unfair practice" as used in this chapter.

The 1976 payment amendment does not use the term fraud or any synonym thereof. Congress was not concerned merely with fraudulent failures to pay. Congress was concerned with all failures to pay (see the legislative history quoted in the original decision herein at 18). The 1976 payment amendment was enacted because livestock buyers (primarily packers) failed to pay for substantial amounts of livestock. See *In re Beef Nebraska, Inc.*, 44 Agric. Dec. [2786 (1985), *aff'd*, 807 F.2d 712 (8th Cir. 1986)]. As stated in the House Report on the 1976 amendatory legislation (H.R. Rep. No. 1043, 94th Cong., 2d Sess. 5 (Apr. 14, 1976)):

> Between 1958 and early 1975 167 packers failed, leaving livestock producers unpaid for over $43 million worth of livestock. By far the largest of such failures was that of American Beef Packers (ABP), which went bankrupt in January, 1975, leaving producers in 13 states unpaid for a total of over $20 million in livestock sales.

The average loss to livestock sellers as a result of each packer failure from 1958 through early 1975 was $257,485.02 ($43,000,000 ÷ 167 = $257,485.02). If we omit the one $20 million failure of American Beef Packers, the average loss to livestock sellers from each packer failure from 1958 through early 1975 was $138,554.21 ($23,000,000 ÷ 166 = $138,554.21).

In the present case, although the amount of respondent's failures to pay is not as great as the amounts involved in *Garver* or *Mid-States Livestock*, this case warrants a very severe sanction because it is the third proceeding against respondent involving payment violations.

In fact, a very severe sanction would have been appropriate even if respondent had paid in full prior to the hearing. This follows because of respondent's two prior sanctions for payment violations, and because of the Department's severe sanction policy, designed both to prevent the respondent from again violating the Act, and to deter others. This was stated in *In re Apex Meat Co.*, 44 Agric. Dec. 1855, 1877 (1985), *aff'd*, No. 85-3189 (D.D.C. Sept. 19, 1986), *aff'd per curiam*, No. 86-5627 (D.C. Cir. Sept. 16, 1987), as follows (emphasis added):

> The argument that a respondent is presently complying with the relevant regulatory program is made in almost every disciplinary case that comes before the Judicial Officer, and is almost always true. Only a foolhardy respondent would continue to violate a regulatory statute, after a complaint is filed, pending the outcome of the litigation.

Exemplary conduct during the course of litigation is never considered as a weighty, mitigating circumstance.

Where a serious and wilful violation of a regulatory statute administered by this Department is found to have been committed, it is the consistent policy of this Department to impose a remedial sanction without regard to the respondent's present compliance with the Act and without making any determination that it is likely that respondent will again violate the Act in the future.[15] *No second chance is given.*

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[15] *E.g., In re Sterling Colo. Beef Co.*, 39 Agric. Dec. 184, 238-39 (1980), *appeal dismissed*, No. 80-1293 (10th Cir. Aug. 11, 1980); *In re American Fruit Purveyors, Inc.*, 38 Agric. Dec. 1372, 1387-88 (1979), *aff'd per curiam*, 630 F.2d 370 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981); *In re Mountainside Butter & Egg Co.*, 38 Agric. Dec. 789, 800 (1978) (remand order), *final decision*, 39 Agric. Dec. 862, 863-64 (1980), *aff'd*, No. 80-3898 (D.N.J. June 23, 1982), *aff'd mem.*, 722 F.2d 733 (3d Cir. 1983), *cert. denied*, 104 S. Ct. 1417 (1984); *In re L.R. Morris Produce Exch., Inc.*, 37 Agric. Dec. 1112, 1120 (1978); *In re Breckenridge Auction & Sales Co.*, 36 Agric. Dec. 1522, 1530 (1977); *In re DeJong Packing Co.*, 36 Agric. Dec. 1181, 1218-21 (1977), *aff'd*, 618 F.2d 1329 (9th Cir.) (2-1 decision), *cert. denied*, 449 U.S. 1061 (1980); *In re Catanzaro*, 35 Agric. Dec. 26, 35 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467; *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 135, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re Miller*, 33 Agric. Dec. 53, 62, 81, *aff'd per curiam*, 498 F.2d 1088 (5th Cir. 1974).

Respondent claims that its search for a bond *pendente lite* is mitigating. It is not, for the reasons immediately above. Moreover, it is well-settled that operating without a bond is a serious violation, and efforts to secure a bond do not mitigate from the violation. This was recently restated in *In re Porter*, 47 Agric. Dec. ____, slip op. at 26 (Apr. 28, 1988), as follows (emphasis added):

> Respondent did not acquire the required bond coverage and continued operations without maintaining adequate bond coverage. This is a willful violation of the Act (7 U.S.C. § 204) and the regulations (9 C.F.R. §§ 201.29, 201.30) thereto. *Circumstances portraying respondent's efforts to obtain adequate bonding do not mitigate from the violation. In re: Donald Hageman*, 43 Agric. Dec. 531 (1983); *In re: Molnar Packing Company*, 41 Agric. Dec. 935 (1982); *In re: E. Gursky*, 38 Agric. Dec. 1178 (1979).

Respondent argues that the record shows that no one was financially damaged by respondent's conduct. First of all, this is not true, because both Smithville and Four County were financially hurt. Mr. Poulson, president of Four County, testified that he had to borrow funds to cover the respondent's bounced checks (Tr. 28). Likewise, Mr. Lentz, owner of Smithville, testified that he had to use his own money and a line of credit to cover his outstanding balance with respondent (Tr. 49). On the date of the hearing many thousands of dollars were still due and payable.

But, even if it were true that the sellers of livestock were somehow not shown to be hurt financially by respondent's failure to pay, this would not sufficiently mitigate matters for respondent. This follows because "it has been consistently Departmental policy under section 312(a) of the Act (7 U.S.C. § 213(a)) that it is not necessary to prove particular injury, because it is the Department's duty to stop unlawful practices in their incipiency, prior to actual injury" (*In re White*, 47 Agric. Dec. ____, slip op. at 73 (Jan. 11, 1988), *appeal docketed*, No. 88-3144 (6th Cir. Feb. 22, 1988)).

The ALJ notes (Initial Decision at 9) that Smithville had financial problems sufficient to cause a shutdown between April and July 1986; which perhaps was caused in part by respondent's failure to pay. I make no judgment on that possibility, except to note that both Four County's (Tr. 30) and Smithville's (Tr. 51) operators testified that they had no other customers in arrears. Once again, respondent is arguing what essentially is the belief that bad economic conditions apply only to him, and should mitigate his sanctions. I find no sufficiently mitigating factors here.

Respondent's arguments are self-serving and have no satisfactory basis. Respondent has not shown good faith or proven good faith. Rather, respondent's violations are the same as in 1972 and 1975, and *were committed while constrained by a permanent injunction*. Respondent claims that the violations were not willful, yet the ALJ properly concluded that respondent's violations were willful, as delineated in *Farrow, supra*, at 8. Parenthetically, I note that respondent's violations were committed with knowledge of their illegality, because respondent received a warning letter in 1980, and was under the consent order of 1972 and the permanent injunction of 1975.

Finally, respondent argues that these were not serious violations, and that the respondent's good faith and mitigating circumstances (*viz.*, repayment of creditors, seeking a bond, no harm to creditors, bad economic conditions, etc.) should be considered and found to support the ALJ's reduced sanction. Respondent is wrong on all these points; most of which have already been addressed, *supra*, and found not to be sufficiently mitigating.

Most importantly, respondent is wrong that these violations are not serious. Complainant's witness, Mr. Bob Smith, testified that a dealer who operates without bond coverage commits an unfair and deceptive practice; that issuance of checks in payment for livestock which are returned unpaid is an unfair and deceptive practice; that failing to pay for livestock, when due, is an unfair and deceptive practice; and that failure to pay for livestock is the most

serious violation of the four charges in the complaint. The ALJ apparently did not sufficiently separate the last charge (failure to pay) from the immediately preceding charge (failure to pay, when due), in determining the sanction. Mr. Smith testified, as follows (Tr. 83-87):

BY MS. LASSITER:

Q. Okay. Are you familiar with the bonding requirements of the Act?

A. Yes, ma'am.

Q. Does the Packers and Stockyards Administration take a position with regard to a dealer who fails to provide bond coverage?

A. Yes. Operating without bond coverage is an unfair and deceptive practice.

Q. Any why is it unfair and deceptive?

A. The firms from whom the dealer purchases livestock has the right to expect that the registrant has the required bond coverage when they purchase the livestock.

Q. And why is bond coverage important?

A. Because it is a secondary source of payment in the event that the principal does not make payment for the livestock.

Q. Are you familiar with the prompt-payment requirements of the Act?

A. Yes, I am.

Q. And does the Packers and Stockyards Administration take a position with regard to violations of the prompt-payment requirements?

A. Yes. This is an unfair and deceptive practice, because, in the absence of a written agreement made before the purchase of livestock, the seller has the right to expect full payment for livestock no later than close of the next business day following the sale of the livestock.

Q. Does a violation of the prompt-payment requirements have an

impact on other registrants of the Act?

A. Yes. In case of an auction market, if a firm does not receive payment in the required time, it is necessary that it place its own funds into the custodial account.

Q. What is the position of the Packers and Stockyards Administration with regard to the issuance of checks in payment of livestock which are returned unpaid?

A. This is an unfair and deceptive practice in that when the seller of livestock receives a check in payment for the livestock they have the right to expect that the check will be honored when presented for payment.

This is an aggravating circumstance, because there has been in the case of an NSF check -- there has been an indication of payment. However, when the check is presented and no funds are available, payment has not been received.

This is a separate and distinct violation problem: failing to pay for livestock when due.

Q. Does the Packers and Stockyards Administration take a position with regard to failure to pay when due?

A. Yes.

Q. And what is that?

A. It is an unfair and deceptive practice.

Q. Now, what distinguishes the issuances of checks which are returned for insufficient funds and the failure-to-pay-when-due violations?

A. The failure to pay when due occurs when the payment is not paid prior to the close of the next business day after the sale of livestock. The issuance of an NSF check could occur at any time after that purchase of livestock including the date in which it was purchased.

Q. So if I -- correct me if I am mischaracterizing your testimony. So you are separating the two in terms of the issuance of the check as a presentment of a check which purports to be payment right then. Is that what you are --

A. Yes.

Q. Okay. Now, Mr. Smith, in preparing for your testimony today, did you read and review the complaint and the allegations contained?

A. Yes, I did.

Q. Particularly, did you read the allegation which refers to the failure to pay for livestock and the amount currently outstanding?

A. Yes, I did.

Q. And did you hear the testimony of Mr. Poulson and Mr. and Mrs. Lentz where they stated that as of today they have yet to receive full payment for the livestock?

A. Yes.

Q. What is the position of the Packers and Stockyards Administration with regard to the failure to pay for livestock?

A. Failure to pay for livestock is a serious violation of the Act. It is the most serious violation contained in this complaint, because when firms do not receive payment for livestock, in the case of an auction market, they are required to place the funds in the custodial account within the required period of time.

And when they do not receive the funds from the buyer, it is necessary that these funds be either obtained from their own funds which they have available or they may be required in some instances to borrow the money to put into the custodial account.

In some instances, failure to pay for livestock has caused the firms who did not receive payment to fail financially.

Q. Okay. Does it have an impact on any other registrants of the Act besides auction market?

A. Yes, it could. If the auction market did not have the funds on their own to place in the custodial account and were not able to borrow the funds, they would not be able to make payment to the consignors of the livestock.

Q. Now you just testified that the failure to pay for livestock is the most serious violation here. What particular characteristic about this case which makes it so serious?

A. The long length of time which has expired from the time the livestock was purchased until now with full payment still not having been made.

Thus, these charges are serious, and not "insignificant," as respondent has argued. The charges would support the sanction originally requested by complainant, even without the aggravating existence of past violations Respondent was the subject of a cease and desist order in 1972 for failing to pay for livestock, when due, and issuing NSF checks. Moreover, respondent was prosecuted by the Department of Justice for violation of that order in 1975, receiving a $500 fine and a permanent injunction. Mr. Smith testified to this, as follows (Tr. 88):

BY MS. LASSITER:

Q. Okay. Now, Mr. Smith, why are you recommending five years; a five-year suspension?

A. A five-year suspension seems appropriate in this case in order to deter Mr. Tiemann from further violations of the Act and also to deter others who might be inclined to engage in the same violations which Mr. Tiemann has engaged in.

Q. Are there any particular factors relevant to this case which you considered in reaching the five-year suspension?

A. Yes, there are.

Q. And what are those?

A. Mr. Tiemann in 1972 was the subject of a previous administrative order which ordered him to cease and desist from failing to pay for livestock when due and issuing NSF checks.

Subsequent to that time in 197[5], Mr. Tiemann was the subject of a Justice action for the violation of that order which resulted in a permanent injunction being issued and a $500 civil penalty being assessed.

For all of the foregoing reasons, I agree with complainant's recommendation for a 5-year suspension order, which may be terminated after 180 days if respondent demonstrates that all unpaid livestock sellers have been

paid in full and that the bonding requirements have been met, with a further proviso that application may be made for an order permitting respondent's salaried employment by another registrant after 180 days.

It is the policy of this Department to impose severe sanctions for violations of any of the regulatory programs administered by the Department that are repeated or that are regarded by the administrative officials and the Judicial Officer as serious, in order to serve as an effective deterrent not only to the respondents, but also to other potential violators. The basis for the Department's severe sanction policy is set forth at great length in numerous decisions, *e.g.*, *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. ____, slip op. at 213-51 (Mar. 19, 1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988), which is set forth as Appendix C to this decision.[3]

In addition, the sanctions imposed under the Packers and Stockyards Act in recent years have been much more severe than during earlier years, *e.g.*, *In re Murfreesboro Livestock Market, Inc.*, 46 Agric. Dec. ____ (Aug. 13, 1987) (1-year suspension for custodial account violations and various fraudulent activities); *In re Parchman*, 46 Agric. Dec. ____ (May 28, 1987) (90-day suspension and $10,000 civil penalty for weighing violations), *aff'd*, 852 F.2d 858 (6th Cir. 1988); *In re Rotches Pork Packers, Inc.*, 46 Agric. Dec. ____ (Apr. 13, 1987) ($50,000 civil penalty for failing to pay for meat products); *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. ____ (Mar. 19, 1987) (10-year suspension and $30,000 civil penalty for increasing prices and weights in commission purchases), *aff'd*, 841 F.2d 1451 (9th Cir. 1988); *In re Welch*, 45 Agric. Dec. 1932 (1986) (decision as to Benson) ($10,000 civil penalty and

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[3] Severe sanctions issued pursuant to the Department's severe sanction policy were sustained, *e.g.*, in *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. 590 (1986), *aff'd*, 810 F.2d 916 (9th Cir. 1987); *In re Collier*, 38 Agric. Dec. 957, 971-72 (1979), *aff'd per curiam*, 624 F.2d 190 (9th Cir. 1980) (unpublished); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1362-63 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980); *In re Muehlenthaler*, 37 Agric. Dec. 313, 330-32, 337-52, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 549-51 (1977), *aff'd sub nom. Van Wyk v. Bergland*, 570 F.2d 701 (8th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1133-34 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1561 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Catanzaro*, 35 Agric. Dec. 26, 31-32 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467 (1977); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 796, 801 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750, 762 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171, 178, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 133, 145-60, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1913-14 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 515, 539-50 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re Miller*, 33 Agric. Dec. 53, 64-80, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974).

1-year prohibition from engaging in business subject to the Act for fraud b an auction market employee); *In re Garver*, 45 Agric. Dec. 1090 (1986) (2-yea suspension for failing to pay for livestock), *aff'd*, 838 F.2d 470 (6th Cir. 1988 (unpublished); *In re Holiday Food Services, Inc.*, 45 Agric. Dec. 1034 (1986 ($50,000 civil penalty for commercial bribery), *remanded*, 820 F.2d 1103 (9t Cir. 1987); *In re Corn State Meat Co.*, 45 Agric. Dec. 995 (1986) ($50,000 civ penalty for commercial bribery); *In re Blackfoot Livestock Commission Co.*, 45 Agric. Dec. 590 (1986) (6-month suspension for custodial account and check-kiting violations), *aff'd*, 810 F.2d 916 (9th Cir. 1987); *In re Farmers & Ranchers Livestock Auction, Inc.*, 45 Agric. Dec. 234 (1986) (decision as to Millspaugh) (5-year suspension, but permitting respondent to be employed as an auctioneer after 1 year, for check-kiting, custodial account and payment violations, and purchasing livestock for speculation out of consignments); *In re Saylor*, 44 Agric. Dec. 2238 (1985) (decision on remand) (8-month suspension and $10,000 civil penalty for fraudulent sales and purchases); *In re ITT Continental Baking Co.*, 44 Agric. Dec. 748 (1985), *final consent decision*, 44 Agric. Dec. 1971 (1985) ($10,000 civil penalty for discriminatory promotional allowances); *In re Powell*, 44 Agric. Dec. ____ (Mar. 7, 1985) (5-year suspension for failure to pay for livestock), *appeal denied*, 44 Agric. Dec. 1220 (1985) (appeal not timely filed); *In re Mid-West Veal Distributors*, 43 Agric. Dec. 1124 (1984) ($77,000 civil penalty, with $27,000 suspended, for payment, bond and trust violations); *In re Mayer*, 43 Agric. Dec. 439 (1984) (decision as to respondent Doss) (2-year suspension for payment violations), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Peterman*, 42 Agric. Dec. 1848 (1983) ($20,000 civil penalty for bait-and-switch advertising and deceptive practices), *aff'd*, 770 F.2d 888 (10th Cir. 1985).

In closing, I note that it is axiomatic that the Judicial Officer assigns great weight to the sanction recommendations of the agency officials of the Department. In the absence of the agency recommendation, a more severe sanction might have been imposed for this three-time violator. See *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. ____, slip op. at 186 (Mar. 19, 1987) (10-year suspension and $30,000 civil penalty), *aff'd*, 841 F.2d 1451 (9th Cir. 1988).

Order

Respondent Edward Tiemann, directly or through any corporate or other device, his successors and assigns, shall cease and desist from:

1. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations;
2. Issuing checks or drafts in payment for livestock without having sufficient funds on deposit and available in the account upon which they are drawn to pay such checks or drafts when presented;
3. Failing to pay, when due, for livestock purchases; and
4. Failing to pay for livestock purchased.

Respondent Edward Tiemann is suspended as a registrant under the Act for a period of 5 years, *Provided, however*, That upon application to the Packers and Stockyards Administration, a supplemental order may be issued terminating this suspension after the expiration of 180 days, after respondent demonstrates that all unpaid livestock sellers have been paid in full and that he has filed and is maintaining a reasonable bond or its equivalent, as required by the Act and the regulations, and *Provided further*, That this order may be modified upon application to the Packers and Stockyards Administration to permit respondent's salaried employment by another registrant after the expiration of 180 days.

The cease and desist provisions of this order shall become effective on the day after service of this order. The suspension provisions shall become effective on the 30th day after service of this order.

Appendix A

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	P. & S. Docket No. 4633
	)	
Edward Tiemann,	)	
	)	
Respondent	)	**Consent Order**

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*) instituted by complaint filed on April 3, 1972 by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that respondent has violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*).

On April 27, 1972, respondent filed an answer in which he admits the jurisdictional allegations of the complaint, neither admits nor denies the remaining allegations and consents to the issuance of a specified order containing findings of facts and conclusions based upon the allegations of the complaint. Complainant has recommended that the cease and desist order consented to by respondent be issued.

Findings of Fact

1. (a) Edward Tiemann, hereinafter referred to as the respondent, is an individual whose address is Route 1, Box 103-A, Brenham, Texas 77633.

(b) Respondent is, and at all times material herein was:

(1) Engaged in the business of buying and selling livestock i commerce for his own account; and

(2) Registered with the Secretary of Agriculture as a dealer to bu and sell livestock in commerce.

2. Respondent, in connection with his operations as a dealer, on or abou the dates and in the transactions set forth in paragraph II of the complain purchased livestock, in commerce, and in purported payment therefor, issue checks which were returned unpaid by the bank upon which they were draw because respondent did not have sufficient funds on deposit in the accour upon which such checks were drawn.

3. Respondent, in connection with his operations as a dealer, on or abou the dates and in the transactions set forth in paragraph II of the complain purchased livestock, in commerce, and failed to pay, when due, the fu purchase price for such livestock.

4. Respondent, in connection with his business as a dealer, failed to kee accounts, records and memoranda which fully and correctly disclosed al transactions involved in his business as a dealer under the Act in tha respondent failed to keep and maintain a general ledger of accounts showin assets, liabilities, and net worth.

Conclusions

By reason of the facts set forth in Findings of Fact 2 and 3, respondent ha violated section 312(a) of the Act (7 U.S.C. 213(a)) and section 201.43(b) o the regulations (9 CFR 201.43(b)).

By reason of the facts set forth in Findings of Fact 4, respondent ha violated section 401 of the Act (7 U.S.C. 221).

Inasmuch as respondent has consented to the issuance of the order se forth below and complainant has recommended that such order be issued, the order will be issued.

Order

Respondent shall cease and desist from:

1. Issuing checks in purported payment for livestock purchased ir commerce without having and maintaining sufficient funds on deposit in the bank account on which they are drawn to pay such checks; and

2. Failing to pay, when due, the full purchase price of livestock purchased in commerce.

Respondent shall keep accounts, records, and memoranda which fully and correctly disclose all transactions involved in his business as a dealer subject to the Act including a general ledger of accounts showing assets, liabilities, and net worth.

The order shall become effective on the sixth day after service upon the respondent. Copies hereof shall be served upon the parties.

Appendix B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA	)	
v.	)	CIVIL NO. A-74-CA-160
EDWARD TIEMANN	)	

CONSENT JUDGMENT

Came on to be considered the Stipulation for Consent Judgment between Plaintiff, United States of America, and Defendant, Edward Tiemann.

It appearing to the Court that Defendant is an individual with his principal place of business at Brenham, Texas, within the jurisdiction of this Court; and

It further appearing to the Court that Defendant is now and was at all times material herein engaged in the business of a dealer within the meaning of the Packers and Stockyard Act, 1921, as amended and supplemented (7 U.S.C. § 181, *et seq.*), hereinafter referred to as the Act, and jurisdiction therefore is found in 28 U.S.C. §§ 1345 and 28 U.S.C. 1355, and further that Defendant was and is subject to the provisions of the Act; and

It further appearing to the Court that Plaintiff and Defendant have stipulated and the Court finds that on May 17, 1972, the judicial officer of the United States Department of Agriculture, acting as and for the Secretary of Agriculture of the United States, under the authority delegated to him by the said Secretary to perform regulatory functions, issued an Order (31 A.D. 631), pursuant to the provisions of Section 312 of the Act (7 U.S.C. § 213), ordering the Defendant to cease and desist from (1) issuing checks in purported payment for livestock purchased in commerce without having and maintaining sufficient funds on deposit in the bank account upon which they are drawn to pay such checks; and (2) failing to pay, when due, the full purchase price of livestock purchased in commerce.

It further appearing to the Court that Plaintiff and Defendant have stipulated and the Court finds that such Order of the judicial officer of the United States Department of Agriculture was lawfully made upon the basis of a Complaint issued and served upon the Defendant under the provisions of the Act; was duly served upon the Defendant on May 17, 1972; and is now and has been since its effective date, May 23, 1972, in full force and effect. A copy of said Order is attached hereto as Exhibit "A" of this Judgment.

It further appearing to the Court that Plaintiff and Defendant have stipulated and the Court finds that Defendant, on nine days during the period from August 14, 1973, through December 13, 1973, knowingly failed to obey the provisions of the Order referred to in Exhibit "A" herein, in that, as

specified in the tabulation attached hereto as Exhibit "B," he purchased livestock in commerce and in purported payment for such livestock, issued checks which were returned by the bank upon which they were drawn because he did not have sufficient funds on deposit in the bank account upon which they were drawn to pay such checks, and he failed to pay, when due, the full purchase price of such livestock.

It further appearing to the Court that Plaintiff and Defendant have stipulated and the Court finds that on six other dates during the same period said Defendant purchased livestock in commerce and failed to pay, when due, the full purchase price of the livestock.

It further appearing to the Court that Defendant will, unless enjoined, continue to violate the provisions of the Order of the Secretary of Agriculture referred to in Exhibit "A" herein.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Defendant pay to the United States of America the sum of FIVE HUNDRED AND NO/100 DOLLARS ($500.00).

IT IS, FURTHER, ORDERED, ADJUDGED AND DECREED that Defendant, his agents and employees, directly or indirectly, be permanently enjoined from violating provisions of the Order of the Secretary of Agriculture referred to in Exhibit "A," herein; and

IT IS, FURTHER, ORDERED, ADJUDGED AND DECREED that Defendant pay all costs of this proceeding.

Appendix C

Excerpt from *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. ___, slip op. at 213-51 (Mar. 19, 1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988).

U.S.D.A. Sanction Policy

In re: ASINELLI, INC., d/b/a FAMILY PRODUCE.
PACA Docket No. D 88-528.
Decision and Order filed August 12, 1988.

Failure to make prompt payment - Failure to file an answer.

Peter Train, for Complainant.
Respondent, pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on May 4, 1988, by the Acting Administrator, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period July 1987 through October 1987, respondent purchased, received and accepted, in interstate and foreign commerce, from 39 sellers, 80 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balances thereof in the total amount of $228,152.59.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a default order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Asinelli, Inc., is a corporation doing business as Family Produce, whose address is 2101 Tobacco Road, Durham, North Carolina 27704.

2. Pursuant to the licensing provisions of the Act, license number 851872 was issued to respondent on August 28, 1985, was renewed annually, presently is in effect, and is next subject to renewal on or before August 28, 1988.

3. As more fully set forth in paragraph 5 of the complaint, during the period July 1987 through October 1987 respondent purchased, received and accepted in interstate and foreign commerce, from 39 sellers, 80 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $228,152.59.

Conclusions

Respondent's failure to make full payment promptly with respect to the 80 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

Respondent's license is revoked.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final October 24, 1988.--Editor.]

In re: LONNIE D. GREENE, d/b/a L. D. GREENE COMPANY.
PACA Docket No. D-88-539.
Decision and Order filed October 18, 1988.

Failure to make full payment promptly - Failure to pay license renewal fee - Admission of material allegations.

Edward M. Silverstein, for Complainant.
Respondent, pro se.
Decision and Order issued by Paul Kane, Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*; hereinafter referred to as the "Act"), instituted by a Complaint filed on August 10, 1988, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

The Complaint alleges that during the period August 1986 through November 1986, Respondent failed to make full payment promptly to 16 sellers of the agreed purchase prices, or balances thereof, in the total amount of $164,894.13 for 30 lots of perishable agricultural commodities, which it purchased, received and accepted in interstate commerce. A copy of the Complaint was served upon Respondent. Respondent filed an Answer admitting the material allegations of the Complaint. The Respondent and Complainant have now agreed to the entry of a Decision and Order as set forth herein. Therefore, pursuant to Section 1.138 of the Rules of Practice (7

§ CFR 1.138), the following Decision and Order is issued without further proceedure or hearing.

Findings of Fact

1. Respondent, Lonnie D. Greene is an individual, doing business as L. D. Greene Company, whose mailing address is P.O. Box 2170, Olathe, Kansas 66061-2170.

2. Pursuant to the licensing provisions of the PACA, license number 781787 was issued to Respondent on July 19, 1978. This license was renewed annually, but terminated July 19, 1987, when Respondent failed to pay the required annual renewal fee.

3. The Secretary has jurisdiction over Respondent and the subject matter involved herein.

4. As set forth more fully in paragraph 5 of the Complaint, during the period August 1986 through November 1986, Respondent failed to make full payment promptly to 16 sellers of the agreed purchase prices, or balances thereof, in the total amount of $164,894.13 for 30 lots of perishable agricultural commodities purchased, received and accepted in interstate commerce.

Conclusions

Respondent has committed willful, flagrant and repeated violations of Section 2 of the PACA (7 U.S.C. § 499b), by failing to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 4 above, for which the Order below is issued.

Order

A finding has been made that Respondent committed willful, flagrant and repeated violations of the PACA.

This order shall become effective October 28, 1988.

Copies hereof shall be served upon the parties.

In re: McQUEEN BROTHERS PRODUCE COMPANY, INC.
PACA Docket No. 2-6956.
Order filed October 19, 1988.

The Judicial Officer denied respondent's petition for reconsideration for the reasons previously stated. Since respondent called no witnesses to rebut complainant's damaging testimony, an inference is drawn that respondent's testimony would have been adverse to respondent's interests here.

Andrew Y. Stanton, for Complainant.
A. Vance McQueen, Shelbyville, IN, for Respondent.
Order issued by Donald A. Campbell, Judicial Officer.

ORDER DENYING PETITION FOR RECONSIDERATION

Respondent's petition for reconsideration is denied for the reasons se forth in the Decision and Order previously filed in this proceeding o September 8, 1988.

Respondent's petition reargues several issues which were correctly decide below by the ALJ, and affirmed by the Judicial Officer. Complainant's Repl (October 13, 1988) correctly answers each of respondent's points, and n purpose would be served by rehashing them again here.

I note that respondent called no witnesses to rebut complainant's damaging testimony. Under the settled principle that has been followed in many proceedings before this Department,[1] and which has been followed in many judicial proceedings,[2] I infer that respondent's testimony would have been

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[1] *E.g., In re Murfreesboro Livestock Market, Inc.*, 46 Agric. Dec. ____, slip op. at 30-32 (Aug. 13, 1987); *In re Corn State Meat Co.*, 45 Agric. Dec. 995 (1986); *In re Farmers & Ranchers Livestock Auction, Inc.*, 46 Agric. Dec. 234 (1986); *In re Grady*, 45 Agric. Dec. 66 (1986); *In re Haring Meats and Delicatessen, Inc.*, 44 Agric. Dec. 1886 (1985); *In re Saylor*, 44 Agric. Dec. 2238 (1985) (decision on remand); *In re Petty*, 43 Agric. Dec. 1406 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re Jarosz Produce Farms, Inc.*, 42 Agric. Dec. 1505 (1983); *In re Farrow*, 42 Agric. Dec. 1397 (1983), *aff'd in part and rev'd in part*, 760 F.2d 211 (8th Cir. 1985) (merits affirmed; suspension reversed); *In re Mattes Livestock Auction Market, Inc.*, 42 Agric. Dec. 81, 101-02, *aff'd*, 721 F.2d 1125, 1130 (7th Cir. 1983); *In re Stamper*, 42 Agric. Dec. 20, 32 n.4 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984); *In re De Graaf Dairies, Inc.*, 41 Agric. Dec. 388, 402-03 (1982), *aff'd*, No. 82-1157 (D.N.J. Jan 24, 1983), *aff'd mem.*, 725 F.2d 667 (3d Cir. 1983); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1507 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished); *In re Great Western Packing Co.*, 39 Agric. Dec. 1358, 1363-64 (1980), *aff'd*, No. CV 81-0534 (C.D. Cal. Sept. 30, 1981); *In re Purvis*, 38 Agric. Dec. 1271, 1276-77 (1979); *In re Wilcox*, 37 Agric. Dec. 1659, 1666-67 (1978); *In re Central Ark. Auction Sale, Inc.*, 37 Agric. Dec. 570, 586-87 (1977), *aff'd*, 570 F.2d 724 (8th Cir.) (2-1 decision), *cert. denied*, 436 U.S. 957 (1978); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 305, *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978); *In re Burns*, 36 Agric. Dec. 1668, 1686-87 (1977), *aff'd per curiam*, 575 F.2d 1258 (8th Cir. 1978); *In re DeJong Packing Co.*, 39 Agric. Dec. 607, 637-38 (1977), *aff'd*, 618 F.2d 1329 (9th Cir.) (2-1 decision), *cert. denied*, 449 U.S. 1061 (1980); *In re Loretz*, 36 Agric. Dec. 1087, 1100-01 (1977); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1558 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Whaley*, 35 Agric. Dec. 1519, 1522 (1976); *In re Casca*, 34 Agric. Dec. 1917, 1929-30 (1975); *In re Worsley*, 33 Agric. Dec. 1547, 1571-72 (1974); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 514 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re Speight*, 33 Agric. Dec. 280, 300-01 (1974); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 499 (1972).

[2] 2 Wigmore, *Evidence* §§ 285-91 (3d ed. 1940); *United States v. Di RE*, 332 U.S. 581, 593 (1948); *Interstate Circuit v. United States*, 306 U.S. 208, 225-27 (1939); *Kirby v. Tallmadge*, 160 U.S. (continued...)

adverse to respondent's interests here. "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted." Lord Mansfield, in *Blatch v. Archer*, Cowp. 66, quoted with approval in Wigmore, *Evidence* § 285 (3d ed. 1940).

Order

Respondent's petition for reconsideration is denied. The effective date provisions of the previous order are governed by the stay order of September 22, 1988 (copy attached), which was issued pending the outcome of respondent's proceedings for judicial review.

Attachment

In re:	)	PACA Docket No. 2-6956
	)	
McQueen Brothers Produce	)	
Company, Inc.,	)	Stay Order

The order previously issued in this case is hereby stayed pending the outcome of proceedings for judicial review.

In re: SOUTHLAND & KEYSTONE.
PACA Docket No. D 88-536.
Decision and Order filed September 14, 1988.

Failure to make prompt payment - Failure to maintain sufficient trust assets - Failure to pay license renewal fee - Failure to file an answer.

Andrew Y. Stanton, for Complainant.
Respondent, pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

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[2](...continued)
379, 383 (1896); *Korovos Compania, Etc. v. Atlantica Export Corporation*, 588 F.2d 1, 9-10 (2d Cir. 1978); *International Union v. NLRB*, 455 F.2d 1357, 1362-70 (D.C. Cir. 1971); *Milbank Mut. Ins. Co. v. Wentz*, 352 F.2d 592, 597 (8th Cir. 1965); *Cramling v. Pittsburgh & Lake Erie R.R. Co.*, 327 F.2d 142, 148-49 (3d Cir. 1963); *Hoffman v. CIR*, 298 F.2d 784, 788 (3d Cir. 1962); *Illinois Central R.R. Co. v. Staples*, 272 F.2d 829, 834-35 (8th Cir. 1959); *Neidhoefer v. Automobile Ins. Co. of Hartford, Conn.*, 182 F.2d 269, 270-71 (7th Cir. 1950); *Bowles v. Lentin*, 151 F.2d 615, 619 (7th Cir.), *cert. denied*, 327 U.S. 805 (1946); *Longini Shoe Mfg. Co. v. Ratcliff*, 108 F.2d 253, 256-57 (C.C. P.A. 1939); *NLRB v. Remington Rand, Inc.*, 94 F.2d 862, 867-68 (2d Cir.), *cert. denied*, 304 U.S. 576 (1938).

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on July 7, 1988, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period November 1986 through June 1987, respondent purchased, received, and accepted, in interstate and foreign commerce, from 47 sellers, 315 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $1,187,874.66. It is also alleged that, by failing to make full payment promptly for such commodities, respondent failed to maintain the trust.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Southland & Keystone, is a corporation, whose address is P.O. Box 21037, Los Angeles, California 90021.

2. Pursuant to the licensing provisions of the Act, license number 861590 was issued to respondent on July 3, 1980. This license was renewed annually, but terminated on July 3, 1987, pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)) when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph 5 of the complaint, during the period November 1986 through June 1987, respondent purchased, received, and accepted in interstate and foreign commerce, from 47 sellers, 315 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $1,187,874.66.

4. As more fully set forth in paragraph 7 of the complaint, respondent, by failing to make full payment promptly for the purchase of perishable agricultural commodities, as set forth in paragraph 5 of the complaint, failed to maintain sufficient assets in trust.

Conclusions

Respondent's failure to make full payment promptly with respect to the 315 transactions set forth in Finding of Fact No. 3 above, and failure to maintain the trust, as set forth in Finding of Fact No. 4 above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final October 25, 1988.--Editor.]

In re: VEG-MIX, INC.
PACA Docket No. 2-6612.
Order filed October 11, 1988.

The Judicial Officer denied respondent's petition for reconsideration of the Judicial Officer's remand order for the reasons previously stated by the Judicial Officer.

Edward M. Silverstein, for Complainant.
John M. Himmelberg, Washington, DC, for Respondent.
Order issued by Donald A. Campbell, Judicial Officer.

ORDER DENYING PETITION FOR RECONSIDERATION

Respondent's request for reconsideration of the remand order filed by the Judicial Officer in this proceeding on September 22, 1988, is denied for the reasons set forth in the remand order.

The Judicial Officer's remand order was issued in response to the remand order filed by the United States Court of Appeals--not in response to a motion filed by complainant. Accordingly, respondent's reliance on the rules of practice, which permit a response to a motion or request within 10 days (7 C.F.R. § 1.143(d)), is misplaced. Nonetheless, respondent's arguments have been fully considered, and are denied for the reasons previously set forth.

Briefly, I believe that the court's statement that "the agency is not barred from considering the untimely evidence drawing the status of the Syracuse and Jenkins transactions in question, and it may well wish to do so" is nonbinding dicta. But even if it were a binding ruling, it is permissive, not mandatory. As a matter of sound administrative practice, I do not believe that the evidence offered by respondent should be considered, for the reasons set forth in the remand order, the order denying the petition to reconsider and to

reopen hearing, and Complainant's Response to Respondent's "Petition to Reconsider the Decision of the Judicial Officer."

As stated in the remand order, whether additional briefs should be permitted is a matter to be left to the discretion of the Administrative Law Judge.

Order

Respondent's request for reconsideration of the remand order is denied.

In re: STERLING RILEY, d/b/a RILEY FARMS.
PRPA Docket No. D 88-1.
Decision and Order filed March 10, 1988.

Failure to submit reports and pay assessments - Failure to file an answer.

John D. Griffith, for Complainant.
Respondent, pro se.
Decision and Order issued by Paul N. Kane, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Potato Research and Promotion Act, as amended, 7 U.S.C. §§ 2611-2627, herein referred to as the Act, instituted by a complaint filed by the Administrator, Agricultural Marketing Service, United States Department of Agriculture, charging that the respondent willfully violated the Act, the Potato Research and Promotion Plan, 7 C.F.R. §§ 1207.301-1207.366, and the Rules and Regulations issued pursuant to the Act, 7 C.F.R. §§ 1207.500-1207.550.

Copies of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were served upon respondent by the Hearing Clerk by certified mail. Respondent was informed in the letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact

1. Sterling Riley, hereafter referred to as respondent, is an individual doing business as Riley Farms at Post Office Box 300, Macdoel, California 90658.

2. At all material times, respondent was engaged in business as a producer-handler handling seed potatoes of his own production and was subject to the Act, Plan, and Regulations.

3. Respondent is a designated handler as defined in the Plan, 7 C.F.R. § 1207.308, and the Regulations, 7 C.F.R. § 1207.512. As such, respondent was and is required to submit reports and pay assessments to the National Potato Promotion Board based on the volume of potatoes handled for ultimate consumption as human food and seed. 7 C.F.R §§ 1207.510 and 1207.513.

4. Since July 1, 1982, respondent has violated the Act, Plan Regulations by failing to:

(a) Submit handler reports as required by 7 U.S.C. § 2619 a C.F.R §§ 1207.350 and 1207.513; and

(b) Pay assessments as required by 7 U.S.C. § 2619 and 7 C.F.I 1207.342 and 1207.513 in the amount of $2,937.45.

Conclusions

By reason of the facts set forth in the Findings of Fact above, respondent has willfully violated section 2619 of the Act, 7 U.S.C. § 2 sections 1207.342 and 1207.350 of the Plan, 7 C.F.R. §§ 1207.342, 1207 and section 1207.513 of the Rules and Regulations, 7 C.F.R. § 1207.513.

Order

Respondent Sterling Riley, his agents and employees, directly or thro any corporate or other device, shall comply with each and every provisior the Potato Research and Promotion Act and the Plan and Regulations issu thereunder, shall cease and desist from any violation thereof; and specifica shall pay $2,937.45 which represents past unpaid assessments for the ye 1982 through 1987, shall file handler reports as required by 7 C.F.R. 1207.350 and shall file all future handler reports and pay all futu assessments as required by 7 C.F.R. §§ 1207.342 and 1207.350.

The respondent is assessed a civil penalty of $2,500 which shall be paid a certified check or money order made payable to the Treasurer of the Unit States.

The provisions of this order shall become effective on the first day aft this decision becomes final.

Pursuant to the Rules of Practice, this decision becomes final withou further proceedings 35 days after service as provided in sections 1.142 an 1.145 of the Rules of Practice, 7 C.F.R §§ 1.130-1.151.

Copies hereof shall be served upon the parties.

[This Decision and Order became final October 13, 1988.--Editor.]

BUD ANTLE, INC. v. SPRUTON, INC.
PACA Docket No. 2-7391.
Decision and Order Issued October 18, 1988.

Licenses - Operation under - Agency, apparent authority - Agency, operating on premises of licensee.

Respondent, a licensee under the PACA, ceased doing business as a produce dealer, but continued to operate in another industry. Another firm, operated by some of the ex-officers of respondent, began doing business under a new name at respondent's address. Respondent then moved to a new location, but did not terminate its license. The new firm did not get a license. The new firm then used respondent's name to purchase produce, for which it did not pay. Held: respondent not liable because new firm did not have apparent authority to use its name even though it had made purchases at respondent's old address.

George D. Becker, Presiding Officer.
Complainant, pro se.
Frank Sutton, Clayton, GA, for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act of 1930, as amended (7 U.S.C. § 499a *et seq.*). Complainant filed a timely complaint on August 12, 1986, in which it alleged that respondent owed $8,341.00 in connection with the sale and shipment of six partial truckloads of sugar peas in interstate commerce. Respondent filed an answer to the complaint in which it denied the allegations contained therein. Because the amount in controversy is less than $15,000.00 the shortened method of procedure provided in Section 47.20 of the Rules of Practice issued pursuant to the Act is applicable (7 CFR § 47.20). Complainant is a corporation located in Salinas, California. Respondent is a corporation located in Clayton, Georgia. At the time of the transactions involved in this proceeding respondent was licensed under the Act.

Findings of Fact

1. Prior to April 8, 1985, respondent was in the business of manufacturing a machine for the health food industry involving the growing of sprouts. The founders of the business were Robert Whitson and William Smith. In 1983 Richard E. Brister became president and a member of the Board of Directors of respondent. In 1984 respondent began to handle specialty produce. In 1985 Doug Watts was hired as Sales Manager. On April 8, 1985, respondent secured a PACA license. Difficulties immediately ensued and on September 30, 1985, William Smith, keeping the name of respondent, Spruton, ceased to be affiliated with the produce selling operation, which remained with Robert

Whitson. Robert Whitson began using the name Fresh Era, Inc., for the produce operation. In early December, 1985, Spruton was relocated to Clayton, Georgia, where it continued to do business under the Spruton name. Fresh Era carried on its produce business at the original Spruton address of 1285 Collier Road, N.W., Atlanta, Georgia.

2. In February and March of 1986, complainant sold to the company run by Robert Whitson in six transactions partial truckloads of sugar peas for a total contract price of $10,322.80, f.o.b. The first transaction occurred on or about February 10, 1986. It involved a total contract price of $2,176.80. Fresh Era, through Robert Whitson, paid complainant $1,981.80, leaving $195.00 unpaid with respect to this transaction. With respect to the other five transactions, which occurred between February 20, 1986, and March 12, 1986, no payment was made. The total amount unpaid is $8,341.00.

3. Fresh Era, Inc., did not secure a PACA license when it began to operate in 1985. Rather, it operated without a license, apparently believing that the Spruton license had become its property. It applied for a renewal of that license in April, 1986, and at that time advised the Secretary of Agriculture of the name change and the change in ownership, officership and directorship which had occurred in 1985. The Secretary advised Fresh Era, Inc., that it had to apply for a new license because the Spruton license was not transferable. Fresh Era, Inc., never did so.

4. The purchases made by Fresh Era, Inc., in February and March, 1986, were made, at least partly in the Spruton name. Complainant did not deal with William Smith of Spruton. Rather, it dealt with representatives of Fresh Era, Inc., with respect to these transactions.

5. A shipper's bill of lading with respect to the second transaction, which occurred on February 19, 1986, showed that complainant was aware of the existence of Fresh Era. There was contained in handwritten form on the bottom of bill of lading it attached to the complaint the words "FRESH ERA SPRUTON 140 boxes Received Robert Whitson". It appears that this document is a return from the carrier after the peas were delivered to Fresh Era, and shows that Robert Whitson signed for them as the individual receiving the produce, mentioning that Fresh Era was the receiver.

Discussion

This proceeding raises a very difficult question as to whether respondent, Spruton, Inc., is liable for the actions of another corporation, Fresh Era, Inc., because Spruton somehow failed to carry out a duty to inform members of the perishable agricultural commodities industry that it no longer was operating in that industry. Pursuant to (7 U.S.C. § 499a(6)) "any person not considered as a "dealer" under clauses (a), (b), and (c) may elect to secure a license under the provisions Section 3 of this Act, and in such case and while the license is in effect such person shall be considered as a "dealer". In view of this provision, the simple fact that Spruton ceased to do business in the produce industry sometime in late 1985 does not mean that it ceased to be a dealer under the Act. Therefore, the Secretary has jurisdiction to consider

whether the factual circumstances surrounding the six transactions in this proceeding give rise to liability on the part of Spruton for the actions of Fresh Era.

The legal question to be resolved is whether Fresh Era had apparent authority to operate on behalf of Spruton. Rule 22 contained in "Law of Agency", Warren A. Seavey, West Publishing Company, 1964, states: "The rules as to the interpretation of authority apply to the interpretation of apparent authority except that they are applied in light of what the other party to the transactions knows or should know". According to Section D of Rule 22, which pertains to Estoppel:

> "Apparent authority, or more accurately, estoppel, can be created by giving a person the indicia of authority or the apparent ownership of property, or by permitting a third person to do business on the defendant's premises. Not using care to prevent an imposter from operating on the defendant's premises might well subject the defendant to liability to one dealing with him. On the other hand it would be going too far to make the owner of premises liable for the act of such a person merely because he gained access to the premises, if the owner had not been careless."

In order for the doctrine of the estoppel to apply certain conditions must be met. They are that the principal has given indicia of authority to the agent or has knowingly permitted or caused another to appear to be its agent, there must be a representation of the agency, there must be reliance upon such representation by a third party, and such representation must have been acted on in good faith to the injury of that third party. *Sunny Sally, Inc. v. Ray Burke Farmer*, 23 Agric. Dec. 268 (1964).

William L. Smith, the president of Spruton after the break-up of the business arrangement in which Spruton both manufactured a machine and acted as a produce dealer, provided a lengthy statement as regards the business operation of Spruton during 1985 prior to the break-up on September 30, 1985. He also provided considerable supportive documentation to show that there was a falling out between himself and Robert Whitson by December, 1985. We find that Mr. Smith's statement is credible, and give it substantial evidentiary value.

Mr. Smith has proved that Spruton did not begin to operate as a produce dealer until 1984, and received its first license in April, 1985. We glean from the evidence that there was a dispute between himself and Mr. Whitson and the Sales Manager appointed in 1985, Doug Watts, as a result of which it was determined that the machine manufacturing business should be severed from the produce portion of the business. The name "Spruton" was important insofar as the machinery is concerned. Therefore, Mr. Smith took that name

with him to carry on his activities as a manufacturer. The evidence also clearly shows that Fresh Era, Inc., began doing business in the fall of 1985. Subsequently, as shown by a letter from the City of Atlanta dated October 31, 1986, Robert B. Whitson applied for a license for a company known as Fresh Era Produce/Spruton, with a business address at 1285 Collier Road, N.W., Atlanta, Georgia. The date of such application was not shown. Evidently, either as a misunderstanding, or because Mr. Whitson believed the name "Spruton" would have value in his business, it was determined by him that he would seek to use that name.

Mr. Smith also proved through documentation and testimony that in December, 1985, Spruton was relocated from the Collier Road address to Clayton, Georgia. Therefore, insofar as Mr. Smith is concerned he had no knowledge of any activities on the part of Mr. Whitson or Fresh Era after December 1985. Indeed Spruton, having left those premises, cannot be said to have allowed another business to utilize its premises in such a manner as to give it apparent authority to operate as its agent. We cannot find on that basis that Spruton is estopped to deny that it is liable for the transactions involved in this proceeding.

We believe the evidence shows that Mr. Whitson improperly utilized the name of Spruton. The first purchase he made from complainant was on February 2, 1986. A payment of $1,981.80 out of a total of $2,176.80 was made sometime thereafter, leaving $195.00 unpaid. Presumably such payment was made in a check that did not state that it was on the account of Spruton. Furthermore, there was a return bill of lading sent by complainant to Fresh Era for a transaction which occurred either on February 16, 1986, or February 20, 1986, which showed that the name "Fresh Era/Spruton" was being used. There is absolutely no indication that the original company Spruton was involved in any way in the first transaction or any subsequent transaction. There is an indication that complainant should have been put on notice because of a partial payment, at least after the first transaction occurred, although the date of such partial payment is unknown, that an entity known as Presh Era was involved. We find, based on these facts, that Spruton, as reconstituted when it ceased doing business in the produce industry, left as an entanglement the fact that there was a license issued in its name which was not terminated. However, we find, as well, that was not a causative factor for the failure to pay for the produce sold by complainant to Fresh Era Incorporated. Many businesses close without terminating their license until the anniversary date. There would have to be a direct nexus between the failure to do so and the failure to pay, which direct nexus is not present here, for us to find Spruton liable.

We find that Spruton did not give any indicia of authority to Fresh Era, Inc., and did not knowingly permit or cause Fresh Era or Robert Whitson to act as its agent after September, 1985. Spruton clearly did not permit Fresh Era to represent itself as its agent, nor did it represent that Fresh Era was its agent. There was reliance by complainant on the fact that it was selling to Spruton in the first transaction, at least, and probably in two other

transactions which occurred in February, and complainant was injured as a result of that reliance. However, as discussed above, for estoppel to apply all elements must be present. We cannot find on this record that they were. Rather, we believe that Fresh Era acted improperly in utilizing the Spruton name. It may be that Fresh Era is the proper party to be held responsible for the damages which occurred to complainant. In summary, complainant was too far removed from the transaction in terms of time and geographic location to be held liable for the failures to pay by Fresh Era, Inc.

In view of the above,the complaint in this proceeding must be dismissed.

Order

The complaint in this proceeding is dismissed.

Copies of this Order shall be served on the parties.

BOUVET ENTERPRISES v. CARPENTER EXPORT CO.
PACA Docket No. R-88-49.
Order issued October 13, 1988.

Jory M. Hochberg, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Order issued by Donald A. Campbell, Judicial Officer.

ORDER DISMISSING COMPLAINT AND COUNTERCLAIM
(Summarized)

It is ORDERED that the complaint and counterclaim are both DISMISSED, with prejudice.

C.M. BROWN PRODUCE CO., INC. v. METROPLEX PRODUCE CO., INC.
PACA Docket No. R-88-251.
Order issued October 13, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

REPARATION ORDER
(Summarized)

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $4,459.50, with interest thereon at the rate of 13 percent per annum from November 1, 1987, until paid.

BURNAC PRODUCE, INC. v. CALAVO GROWERS OF CALIFORNIA.
PACA Docket No. 2-7186.
Decision and Order issued October 19, 1988.

Evidence - Negative inference rule - Statute of limitations.

Respondent served as a grower's agent for complainant. It deducted money from the deliver selling price without explanation to complainant. Its failure to do so, along with its failure provide documentation it should have had raised the negative inference that the docume would have been favorable to complainant. Several transactions were not considered becau the time for payment arose more than nine months before the informal complaint was filed

Dennis Becker, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding brought pursuant to the provisions of th Perishable Agricultural Commodities Act of 1930, as amended (7 U.S.C Section 499a *et seq.*). A timely informal complaint was filed on October 8 1984. A formal complaint was filed in which complainant alleged tha respondent had failed to make full payment to it with respect to 4 transactions in interstate or foreign commerce in which respondent acted a the consignee for cucumbers grown by complainant. Complainant claimed i was owed $10,239.75. Respondent filed an answer in which it denied that i owed the money as alleged, with the exception of a small amount which i paid. Because the amount in controversy was less than $15,000.00, the shortened procedure provided pursuant to the Rules of Practice issued under the Act is applicable (7 C.F.R. § 47.20). Complainant, Burnac Produce, Inc., is a corporation located in Port St. Lucie, Florida. Respondent, Calavo Growers of California, is a corporation located in Los Angeles, California. At the time of the transactions involved in this proceeding, respondent was licensed under the Act.

Findings of Fact

1. The transactions involved in this proceeding occurred between June 24, 1983, and June 29, 1984. An informal complaint was filed in this proceeding on October 8, 1984. Pursuant to contract respondent was to account to complainant in the week following the date of a transaction. Therefore, allowing fourteen days for such accounting, the earliest day on which a transaction could occur which would be subject to the jurisdiction of this tribunal would be December 25, 1983. All transactions for which an accounting was due prior to January 8, 1984, are barred from consideration because the nine month statute of limitations for filing had expired on October 8, 1984.

2. On November 7, 1979, complainant and respondent entered into a contract under which respondent would market and sell many of the cucumbers produced, harvested and packaged by complainant. Such contract was to continue for one year, and thereafter until canceled by one or the other of the parties. Although complainant called Calavo a consignee of its cucumbers, respondent acted more as a grower's agent. Complainant was to retain title and bear all risk of loss for the cucumbers until the purchasers had received and accepted them. Complainant was to bear the cost for and be responsible for delivery and receipt of goods and services involved in the packaging of the cucumbers. Paragraph 10 of the agreement read as follows:

> As part of the services for which Calavo is receiving its ten (10%) percent F.O.B. packinghouse commission, Calavo shall provide customer invoicing services, arrange transportation services and provide freight claim services, all at no additional cost to Burnac. Calavo's ten (10%) percent F.O.B. packinghouse commission shall be deducted from the delivered selling price, less freight costs to destination. Calavo shall issue to Burnac on a bi-weekly basis, or more frequently when possible, reports of cucumber sales made by Calavo. The full monetary amount of such sales, less Calavo's ten (10%) percent F.O.B. packinghouse commission, shall be remitted to Burnac, via U.S. Mail, in the week following the week in which sales were made, notwithstanding the fact that Calavo may have given terms or credit to purchasers of "Calavo-Burnac" cucumbers. Upon request Calavo shall issue to Burnac an accounting of sales made by Calavo."

3. Respondent kept an agent at complainant's place of business. It placed its orders for cucumbers through its agent, and complainant filled them in that manner. Respondent's agent subsequently provided complainant with the f.o.b. delivered sale price and the cost of freight so that the f.o.b. sale pride for the cucumbers could be computed. It was complainant's custom to put the prices on the bill of lading provided by respondent. In this manner complainant determined the price it should receive for each load of cucumbers which it shipped through respondent. Complainant was not provided with invoices issued by respondent to the various purchasers of the cucumbers. Furthermore, respondent provided only a summary statement as to adjustments which were made with respect to the various transactions involved.

4. Complainant provided proof in the form of bills of lading with the prices and payments noted thereon with respect to the following transactions:

Invoice #	Date of Partial Payment	Amount Unaccounted For
2030379	1/13/84	$ 353.54
2030390	1/20/84	3,716.20
2030476	2/ 3/84	32.00
2030586	2/17/84	149.00
2030756	-----	24.00
2030829	3/30/84	16.75
2030887	4/6/84	7.25
2031074	-----	50.00
2031151	5/11/84	50.00
2031174	5/11/84	75.00
2031175	5/11/84	50.00
2031200	5/11/84	75.00
2031247	5/18/84	42.00
2031336	5/25/84	50.00
2031344	6/1/84	118.25
2031347	-----	4.90
2031363	6/1/84	57.50
2031389	6/1/84	6.00
2031391	6/8/84	105.00
2031408	6/8/84	42.25
2031427	6/8/84	190.00
2031437	6/15/84	176.00
2031456	6/15/84	93.50
2031467	7/15/84	17.10
2031475	-----	38.50
2031508	-----	7.65
2031533	-----	76.60
2031606	7/13/84	330.00
2031624	7/12/84	2,255.36
2031625	7/12/84	595.20
2031631	7/12/84	244.50
2111289	-----	235.20

The total amount set forth in the table above is $9,284.15. The table does not include transactions for which complainant had made a claim in the amount of $954.50 because they occurred prior to December 25, 1983. With respect to invoice no. 2030390 the entire load was dumped after Canadian inspection. Therefore, complainant is not entitled to the contract amount for this load of $3,716.20. In addition, respondent paid $57.50 with respect to invoice no.

2031363. This leaves $5,510.45 not paid to complainant for which respondent has not adequately explained the reasons it did not make such payment.

Discussion

At the outset this tribunal wishes to admonish both parties that the submission of evidence without regard to putting it into an orderly and understandable fashion serves them a disservice. Where there are 47 transactions for which a claim has been made by one party against another, the burden placed upon the tribunal to sort out otherwise difficult documents to determine amounts owed is extremely onerous. Complainant is at fault in this regard insofar as it merely threw together each of the bills of lading with information contained thereon, and a few summary tables for which it did not bother to provide explanations. Respondent is equally culpable in this regard. It provided no further documentation other than summary information in which it attempted to explain away the differentials between the amounts which complainant believed it was entitled to and the amounts which it paid. Indeed, respondent had the capacity to do more than that because it submitted an invoice to each of the customers, and in making adjustments had to have made appropriate notations as regards those adjustments on basic underlying documents. Indeed, as a result of its failure to provide those documents to this tribunal we find it necessary to invoke the negative inference rule insofar as most of the transactions on which complainant makes a claim are concerned. The negative inference rule is one in which the tribunal will infer that when something was not done by a party, if it had done so the information would have been against its best interest. Therefore, negative inferences may be drawn as what that document may show. For an understanding of the rule see *In re: J.A. Speight*, 33 Agric. Dec. 280 (1974); *In re Mattes Livestock Company*, 42 Agric. Dec. 81, 96 (1982); *In re DeJong*, 36 Agric. Dec. 1181, 1213 (1977), affirmed, 618 F.2d 1239, *certiorari denied*, 499 U.S. 1061; *Securities and Exchange Commission v. scott*, 565 F. Supp. 1513 (SD, NY 1983), affirmed *per curiam*, 734 F.2d 118 (2d Cir. 1984); *Chase Manhattan Bank, N.A. v. Frenville*, 67 B.R. 858 (D, NJ 1986).

Based on the imposition of the negative inference rule we find that of the $9,284.15 which complainant claimed, and which fell within the statutory period for which the claim may be made, $3,783.70 was adequately explained by the provision of the Canadian inspection and dump certificate, and respondent's claim that it made payment. This leaves $5,510.45 unpaid, which failure to pay on the part of respondent is a violation of Section 2 of the Act for which reparation must be awarded.

A further word need also be said concerning the statute of limitations. Pursuant to 7 U.S.C. § 499f(a) a party has nine months from the date a transaction occurs in which to file a claim for reparation. Its failure to do so within this period of time will cause this tribunal to lose jurisdiction over the

subject matter of that transaction. *Seald-Sweet Growers, Inc. v. Superior Produce, Inc.*, 43 Agric. Dec. 1227 (1984). It has been previously held that the cause of action arises when payment is due and not made. Nine months prior to the filing of the informal complaint, which will toll the statute of limitations would be January 8, 1984. However, because payment was not due until approximately fourteen days after the transactions occurred, we found that any transaction in which delivery occurred on or after December 25, 1983, could be considered by this tribunal. All other transactions could not be. In a case such as this each individual transaction must stand on its own insofar as the statute of limitations is concerned because there is no certainty as to how many transactions will occur, payment is due on each transaction individually, and there is no final settlement provided for at the end of the shipping period.

Not only do we predicate our finding that respondent owes complainant $5,510.45 on the negative inference rule, but also we predicate our finding on the terms and conditions of the contract. Paragraph 10 of the contract favors complainant in this regard. Respondent's assertion that, of course, there have to be modifications to pricing after delivery cannot withstand scrutiny in view of the clear language that "Calavo's ten (10%) percent F.O.B. packinghouse commission shall be deducted from *the delivered selling price*, less freight costs to destination. . . . The full monetary amount of such sales, less Calavo's ten (10%) percent F.O.B. packinghouse commission shall be remitted Burnac, via U.S. Mail, in the week following the week in which sales were made notwithstanding the fact that Calavo *may have given terms or credit to purchasers*. . . ." (emphasis added) We think this language shows clearly that the parties intended that there be a firm selling price established. We further find that the parties contemplated that respondent was to make full payment of the monetary amount that it charged the buyer, and that no provision was made for adjustments. Most of the charges for which respondent is being held liable were claimed to result from adjustments. There was no indication that they were authorized by complainant. Respondent provided no documentation to show that they were justified.

Order

Within thirty days from the date of this order respondent shall pay to complainant $5,510.45, with interest thereon at the rate of 13 percent per annum from August 1, 1984, until paid.

Copies of this order shall be served on the parties.

BUSHMAN'S, INC. v. INTERNATIONAL A. G., INC.
PACA Docket No. 2-7466.
Decision and Order issued October 18, 1988.

George D. Becker, Presiding Officer.
Complainant, pro se.
C. Peter Buhler, Miami, Florida, for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

The complaint in this proceeding is dismissed.

Copies of this order shall be served on the parties.

CAMERON BROS. CONSTRUCTION CO., INC., SUN VALLEY RANCH DIVISION v. BILLINGSLEY FARMS, INC.
PACA Docket No. 2-7507.
Decision and Order issued October 19, 1988.

George D. Becker, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order respondent shall pay the complainant $2,678.00, with interest thereon at the rate of 13 percent per annum from February 1, 1986, until paid.

Copies of this order shall be served on the parties.

CHAPARRAL FRUIT SALES, INC. v. GREAT AMERICAN FOODS, INC.
PACA Docket No. 2-7488.
Decision and Order issued October 18, 1988.

George D. Becker, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order respondent shall pay to complainant $2,549.00, with interest thereon at the rate of 13 percent per annum from September 1, 1986, until paid.

Copies of this order shall be served upon the parties.

DIAZTECA COMPANY v. PRODUCE MARKETING COMPANY.
PACA Docket No. R-88-175.
Order Issued October 13, 1988.

Decision and Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL
(Summarized)

By letter dated August 25, 1988, complainant notified the Department that it no longer wished to pursue the complaint. Complainant, in its letter of August 25, 1988, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

F. H. DICKS CO. v. SAM WANG FOOD CO., INC.
PACA Docket No. 2-7457.
Decision and Order Issued October 18, 1988.

George D. Becker, Presiding Officer.
Complainant, pro se.
Joseph A. Cerroni, Jr., Falls Church, VA, for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order respondent shall pay to complainant $208.69, with interest thereon at the rate of 13 percent per annum from August 1, 1986, until paid.

Copies of this order shall be served upon the parties.

FRESH WESTERN MARKETING, INC. v. CORPUS CHRISTI PRODUCE CO., INC.
PACA Docket No. 2-7405.
Decision and Order Issued October 19, 1988.

Peter V. Train, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for Complainant.
M. Forest Nelson, Corpus Christi, TX, for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

The complaint is hereby dismissed.

The counterclaim is hereby dismissed.

Copies of this order shall be served on the parties.

GOLDEN EAGLE PRODUCE v. MELON PRODUCE, INC.
PACA Docket No. 2-7393.
Decision and Order issued October 18, 1988.

George D. Becker, Presiding Officer.
Complainant, pro se.
Alan M. Spiro, Boston, MA, for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order respondent shall pay the complainant $5,751.00, with interest thereon with the rate of 13 percent per annum from March 1, 1986, until paid.

Copies of this order shall be served upon the parties.

HORWATH & CO., INC., d/b/a GONZALES PACKING CO. v. A. SAM & SONS CO., INC.
PACA Docket No. 2-7332.
Decision and Order issued October 20, 1988.

Allan R. Kahan, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order respondent shall pay to complainant, as reparation $4,774.50, with interest thereon at the rate of 13 percent per annum from December 1, 1985, until paid.

Copies of this order shall be served upon the parties.

HUNT OIL COMPANY d/b/a PLANTATION PRODUCE COMPANY v. J&J FARMERS MARKET, INC.
PACA Docket No. R-88-239.
Order Issued October 13, 1988.

Decision and Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL
(Summarized)

By letter dated September 22, 1988, complainant notified the Department that a settlement had been reached between the parties. Complainant, in its letter of September 22, 1988, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

S.M. JONES & CO., INC. v. VIC MAHNS, INC.
PACA Docket No. R-88-81.
Order Issued October 13, 1988.

Decision and Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL
(Summarized)

By letter dated September 12, 1988, complainant notified the Department that it no longer wished to pursue this matter. Complainant, in its letter of September 12, 1988, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

LINDY FARMS, INC. v. MELON PRODUCE, INC.
PACA Docket No. 2-7394.
Decision and Order issued October 5, 1988.

George D. Becker, Presiding Officer.
Complainant, pro se.
Alan M. Spiro, Boston, MA, for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order respondent shall pay the complainant $10,407.50, with interest thereon with the rate of 13 percent per annum from April 1, 1986, until paid.

Copies of this order shall be served on the parties.

JOHN LIVACICH PRODUCE, INC. v. VOITA CITRUS, INC.
PACA Docket No. 2-7510.
Decision and Order issued October 19, 1988.

George D. Becker, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for Complainant.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order respondent shall pay the complainant $5,212.80, with interest thereon at the rate of 13 percent per annum from May 1, 1986, until paid.

Copies of this order shall be served on the parties.

J. R. NORTON CO. v. INTERNATIONAL PRODUCE DISTRIBUTORS, INC.

PACA Docket No. R-88-212.
Order issued October 13, 1988.

Decision and Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL
(Summarized)

By letter dated September 16, 1988, complainant notified the Department that a settlement had been reached between the parties. Complainant, in its letter of September 16, 1988, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

CLAYTON J. PELLETIER & JAMES T. PIANETTA d/b/a P&P PRODUCE CO. v. SAM WANG FOOD CO., INC.

PACA Docket No. 2-7467.
Decision and Order issued October 20, 1988.

George D. Becker, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for Complainant.
Joseph A. Cerroni, Jr., Baileys Crossroads, VA, for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order respondent shall pay to complainant $1,607.00, with interest thereon at the rate of 13 percent per annum, from August 1, 1986, until paid.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

RENE PRODUCE DISTRIBUTORS, INC. v. BROOKS A. LISENBEY, d/b/a LISENBEY'S PRODUCE.
PACA Docket No. R-88-133.
Order Issued October 20, 1988.

Decision and Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), complainant has notified the Department that a settlement has been made of all claims against respondent.

Accordingly, the complaint should be and hereby is dismissed.

Copies of this order shall be served upon the parties.

C.H. ROBINSON COMPANY v. SLIDELL WHOLESALE PRODUCE CO., INC.
PACA Docket No. R-88-257.
Order issued October 20, 1988.

Decision and Order issued by Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT
(Summarized)

Under the authority of the above quoted section, respondent shall pay to complainant, as an undisputed amount, $20,976.72. Payment of this amount shall be made within 30 days from the date of this order with interest thereon at the rate of 13 percent per annum from January 1, 1988, until paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act. 7 U.S.C. § 499b.

Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

SAVAGE FARMS LTD. v. H. SACKS & SONS PRODUCE, INC.
PACA Docket No. R-88-201.
Decision and Order issued October 20, 1988.

Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

The presiding officer gave the complainant an opportunity to show cause why its complaint should not be dismissed because it failed to show that it sold and shipped the subject lot of potatoes to respondent, that it invoiced the respondent for the subject lot of potatoes, and that respondent received and accepted the subject lot of potatoes and failed to make full payment promptly therefor. The complainant failed to file any response to this notice to show cause. Accordingly, it is appropriate to dismiss its complaint.

The complaint is dismissed.

Copies of this order shall be served upon the parties.

SCOTT FINKS COMPANY, INC. v. UNITED K.C., INC.
PACA Docket No. 2-7359.
Decision and Order issued October 19, 1988.

Allan R. Kahan, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $2,100.00, with interest thereon at the rate of 13 percent per annum from December 1, 1985, until paid.

Copies of this order shall be served upon the parties.

SIX L'S PACKING CO., INC. v. BOLER FARMS.
PACA Docket No. 2-7392.
Decision and Order issued October 19, 1988.

Allan R. Kahan, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $1,240.00, with interest thereon at the rate of 13 percent per annum, beginning 30 days from the date of this order, until paid.

Copies of this order shall be served upon the parties.

STEVCO, INC. v. DANA R. JOHNSON d/b/a U.S. FOOD MARKETING.
PACA Docket No. 2-7390.
Decision and Order issued October 5, 1988.

George D. Becker, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for Complainant.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order respondent shall pay to complainant $1,082.40, with interest thereon at the rate of 13 percent per annum from November 1, 1986, until paid.

Copies of this order shall be served upon the parties.

SUNFRESH MARKETING OF CALIFORNIA, INC. v. INTERNATIONAL PRODUCE DISTRIBUTORS, INC.
PACA Docket No. R-88-253.
Order Issued October 20, 1988.

Decision and Order issued by Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT
(Summarized)

Under the authority of the above quoted section, respondent shall pay to complainant, as an undisputed amount, $13,689.20. Payment of this amount shall be made within 30 days from the date of this order with interest thereon at the rate of 13 percent per annum from November 1, 1987, until paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act. 7 U.S.C. § 499b.

Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

SYRACUSE & JENKINS PRODUCE v. SOL SALINS, INC.
PACA Docket No. 2-7362.
Decision and Order Issued October 18, 1988.

Allan R. Kahan, Presiding Officer.
Complainant, pro se.
Howard B. Silberberg, McLean, VA, for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $6,293.10, with interest thereon at the rate of 13 percent per annum from February 1, 1986, until paid.

Copies of this order shall be served upon the parties.

TAVILLA SALES CO. v. BLOCH & LODER INC., d/b/a PACIFIC PRODUCE CO.
PACA Docket No. 2-7471.
Decision and Order issued October 19, 1988.

George D. Becker, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

The complaint in this proceeding is dismissed.
Copies of this order shall be served on the parties.

TOMATOES, INC. v. JAMES CORRADO, INC.
PACA Docket No. 2-7384.
Decision and Order issued October 20, 1988.

George D. Becker, Presiding Officer.
Complainant, pro se.
Frank Campisano, Montclair, NJ, for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

The complaint in this proceeding is dismissed.
Copies of this order shall be served on the parties.

TRAY WRAP, INC. v. TOMATO MAN, INC.
PACA Docket No. 2-7412.
Order issued October 20, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER

A Decision and Order was issued in this proceeding on September 8, 1988. On September 29, 1988, complainant filed a "Petition to Rehear, Reargue and Reconsider." This tribunal has reviewed the matters raised in that Petition, and determined that they have either already been considered or lack merit. Therefore, the Petition is denied without service on respondent. The order dated September 8, 1988, remains in effect.

WOERNER PRODUCE CO., INC. v. GENERAL'S VEGETABLE MARKETS, INC.
PACA Docket No. 2-7470.
Decision and Order issued October 20, 1988.

George D. Becker, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order respondent shall pay to complainant $4,705.65, with interest thereon at the rate of 13 percent per annum from July 1, 1986, until paid.

Copies of this order shall be served upon the parties.

REPARATION DEFAULT ORDERS ISSUED BY DONALD A. CAMPBELL, JUDICIAL OFFICER (Summarized)

ADAMS BROS. PRODUCE CO. INC. v. TOXEY G. LANDRUM JR. d/b/a TOXEY GERALD LANDRUM JR.
PACA Docket No. RD-88-487.
Default Order issued October 26, 1988.

Respondent was ordered to pay complainant, as reparation, $36,453.68, plus 13 percent interest per annum thereon from November 1, 1987, until paid.

ALBEE TOMATO CO. INC. v. H. DOMASH PRODUCE CO. INC.
PACA Docket No. RD-88-482.
Default Order issued October 25, 1988.

Respondent was ordered to pay complainant, as reparation, $3,711.50, plus 13 percent interest per annum thereon from October 1, 1987, until paid.

ARROW FARMS INC. v. ANDERSON FARMS INC.
PACA Docket No. RD-88-459.
Default Order issued October 12, 1988.

Respondent was ordered to pay complainant, as reparation, $550.00, plus 13 percent interest per annum thereon from March 1, 1988, until paid.

HENRY AVOCADO PACKING CORPORATION v. PACIFIC RIM PRODUCE MARKETERS INC.
PACA Docket No. RD-88-442.
Default Order issued October 4, 1988.

Respondent was ordered to pay complainant, as reparation, $9,831.00, plus 13 percent interest per annum thereon from December 1, 1987, until paid.

[ACK T. BAILLIE CO. INC. v. SKLARZ PRODUCE CO. INC.
'ACA Docket No. RD-88-477.
)efault Order Issued October 12, 1988.

Respondent was ordered to pay complainant, as reparation, $25,581.25, lus 13 percent interest per annum thereon from January 1, 1988, until paid.

ONITA PACKING CO. v. SMITHPRO BROKERAGE INC.
'ACA Docket No. RD-88-473.
)efault Order Issued October 12, 1988.

Respondent was ordered to pay complainant, as reparation, $5,189.80, plus 3 percent interest per annum thereon from November 1, 1987, until paid.

ONITA PACKING CO. v. SKLARZ PRODUCE CO. INC.
ACA Docket No. RD-88-475.
efault Order issued October 12, 1988.

Respondent was ordered to pay complainant, as reparation, $6,046.50, plus 3 percent interest per annum thereon from February 1, 1988, until paid.

OSGRAAF SALES COMPANY v. CENTRAL PRODUCE CO. INC.
ACA Docket No. RD-88-469.
efault Order Issued October 6, 1988.

Respondent was ordered to pay complainant, as reparation, $6,227.75, plus percent interest per annum thereon from January 1, 1988, until paid.

ORT BROWN INC. v. GUSTAVO MARTINEZ d/b/a ROBERT'S SON CKING.
ACA Docket No. RD-88-444.
:fault Order Issued October 4, 1988.

Respondent was ordered to pay complainant, as reparation, $7,630.00, plus percent interest per annum thereon from July 1, 1987, until paid.

CARDINAL DISTRIBUTING CO. INC. v. SKLARZ PRODUCE CO. INC.
PACA Docket No. RD-88-499.
Default Order issued October 27, 1988.

Respondent was ordered to pay complainant, as reparation, $5,663.50, plus 13 percent interest per annum thereon from February 1, 1988, until paid.

CARLTON FRUIT CO. v. M. G. FORD PRODUCE INC.
PACA Docket No. RD-88-439.
Default Order issued October 4, 1988.

Respondent was ordered to pay complainant, as reparation, $7,323.73, plus 13 percent interest per annum thereon from July 1, 1987, until paid.

CASTIGLIONE BROS. v. GAETANO J. RUSSO d/b/a GR PRODUCE CO.
PACA Docket No. RD-88-235.
Order issued October 13, 1988.

ORDER GRANTING PETITION FOR RECONSIDERATION AND REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), the respondent failed to file a timely answer. However, prior to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 C.F.R. § 47.25(e)). The motion was denied in an order issued June 14, 1988. Respondent filed a petition for reconsideration of the June 14, 1988, order and for reopening after default, submitting a copy of a proposed answer notarized on February 23, 1988, which respondent claims must have been lost in the mail. Respondent asserts that if this proposed answer had not been lost in the mail, it would have been timely filed.

The record has been carefully considered and it is concluded that the motion for reconsideration and reopening was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co. v. United Fruit Distributors*, 16 A.D. 790 (1957). Accordingly, the June 14, 1988, order is vacated, respondent's default in the filing of an answer is set aside and the proposed answer submitted by respondent is hereby ordered filed.

Copies of this order shall be served upon the parties.

RALPH DAUITO & SONS INC. v. T & S PRODUCE INC.
PACA Docket No. RD-88-440.
Default Order issued October 4, 1988.

Respondent was ordered to pay complainant, as reparation, $2,372.00, plus 13 percent interest per annum thereon from July 1, 1987, until paid.

De BRUYN PRODUCE CO. v. LOUIS DESPAUX AND CARL G. PORCHE JR. d/b/a LUCKY US.
PACA Docket No. RD-88-494.
Default Order issued October 27, 1988.

Respondent was ordered to pay complainant, as reparation, $1,445.00, plus 13 percent interest per annum thereon from July 1, 1987, until paid.

DEW-GRO INC. a/t/a CENTRAL WEST PRODUCE v. SMITHPRO BROKERAGE INC.
PACA Docket No. RD-88-497.
Default Order issued October 27, 1988.

Respondent was ordered to pay complainant, as reparation, $11,179.40, plus 13 percent interest per annum thereon from November 1, 1987, until paid.

EMPIRE FRUIT COMPANY v. OLYMPIC FOOD DISTRIBUTORS INC.
PACA Docket No. RD-88-460.
Default Order issued October 12, 1988.

Respondent was ordered to pay complainant, as reparation, $5,234.50, plus 13 percent interest per annum thereon from February 1, 1988, until paid.

EVERKRISP VEGETABLES INC. v. SKLARZ PRODUCE CO. INC.
PACA Docket No. RD-88-476.
Default Order Issued October 6, 1988.

Respondent was ordered to pay complainant, as reparation, $7,375.30, pl
13 percent interest per annum thereon from January 1, 1988, until paid.

A. W. (Steve) FABRIZIO & SON INC. v. PICKLE KING INC.
PACA Docket No. RD-88-480.
Default Order Issued October 25, 1988.

Respondent was ordered to pay complainant, as reparation, $725.00, pl
13 percent interest per annum thereon from August 1, 1986, until paid.

FARMERS' MARKETING SERVICE v. SKLARZ PRODUCE CO. INC.
PACA Docket No. RD-88-501.
Default Order Issued October 27, 1988.

Respondent was ordered to pay complainant, as reparation, $105,211.5
plus 13 percent interest per annum thereon from May 1, 1988, until paid.

FARM PAK PRODUCTS INC. v. SUNNYSIDE PRODUCE CO.
PACA Docket No. RD-88-484.
Default Order issued October 26, 1988.

Respondent was ordered to pay complainant, as reparation, $5,970.00, plu
13 percent interest per annum thereon from January 1, 1988, until paid.

FOUR SEASONS PRODUCE INC. v. GENONIMO'S INC.
PACA Docket No. RD-88-466.
Default Order Issued October 6, 1988.

Respondent was ordered to pay complainant, as reparation, $7,125.00, plu
13 percent interest per annum thereon from February 1, 1988, until paid.

FRUITS OF FOUR SEASONS, INC. v. GLENMERE FARMS, INC.
PACA Docket No. RD-88-353.
Order Issued October 25, 1988.

DENIAL OF MOTION TO REOPEN
(Summarized)

Respondent's motion to reopen after default is denied. The amount awarded in the August 11, 1988, order, including interest, shall be paid to complainant within 30 days from the date of this order.

Copies of this order shall be served upon the parties.

DOMINIC V. GANDOLFO INC. v. ANDERSON FARMS INC.
PACA Docket No. RD-88-491.
Default Order issued October 26, 1988.

Respondent was ordered to pay complainant, as reparation, $300.00, plus 13 percent interest per annum thereon from January 1, 1988, until paid.

GENBROKER CORPORATION a/t/a GENERAL BROKERAGE CO. v. WAYCO CORP. a/t/a AMERITEX PRODUCE.
PACA Docket No. RD-88-463.
Default Order Issued October 6, 1988.

Respondent was ordered to pay complainant, as reparation, $2,016.00, plus 13 percent interest per annum thereon from January 1, 1988, until paid.

GRIFFIN-HOLDER CO. v. TOP QUALITY BROKERAGE INC.
PACA Docket No. RD-88-478.
Default Order issued October 25, 1988.

Respondent was ordered to pay complainant, as reparation, $4,850.00, plus 13 percent interest per annum thereon from November 1, 1987, until paid.

GLEN L. GRIMSLEY d/b/a ARKANSAS VALLEY PRODUCE v. J.T. GREENE PRODUCE INC.
PACA Docket No. RD-88-465.
Default Order issued October 6, 1988.

Respondent was ordered to pay complainant, as reparation, $9,675.00, plus 13 percent interest per annum thereon from April 1, 1988, until paid.

RICHARD M. GOUGHAM d/b/a GOUGHAM FARMS v. CONTINENTAL FARMS INC.
PACA Docket No. RD-88-485.
Default Order issued October 26, 1988.

Respondent was ordered to pay complainant, as reparation, $6,809.85, plus 13 percent interest per annum thereon from September 1, 1987, until paid.

JEROME GROSSMAN d/b/a JEROME BROKERAGE DIST. CO. a/t/a JEROME DIST. CO. v. INTERNATIONAL PRODUCE CO.
PACA Docket No. RD-88-489.
Default Order Issued October 26, 1988.

Respondent was ordered to pay complainant, as reparation, $105,408.50, plus 13 percent interest per annum thereon from July 1, 1987, until paid.

HANSEN FRUIT & COLD STORAGE COMPANY v. CENTRAL PRODUCE CO. INC.
PACA Docket No. RD-88-468.
Default Order issued October 6, 1988.

Respondent was ordered to pay complainant, as reparation, $4,515.00, plus 13 percent interest per annum thereon from January 1, 1988, until paid.

HIGH AND MIGHTY FARMS INC. v. SMITHPRO BROKERAGE INC.
PACA Docket No. RD-88-474.
Default Order Issued October 12, 1988.

Respondent was ordered to pay complainant, as reparation, $14,265.00, plus 13 percent interest per annum thereon from February 1, 1988, until paid.

HERBERT E. HOVERSON & TIMOTHY J. HOVERSEN d/b/a HOVERSEN & SONS v. LEON J. KEEL d/b/a KEEL PRODUCE.
PACA Docket No. RD-88-441.
Default Order Issued October 4, 1988.

Respondent was ordered to pay complainant, as reparation, $2,411.00, plus 13 percent interest per annum thereon from November 1, 1987, until paid.

KIRK PRODUCE INC. v. SMITHPRO BROKERAGE INC.
PACA Docket No. RD-88-447.
Default Order Issued October 4, 1988.

Respondent was ordered to pay complainant, as reparation, $18,660.30, plus 13 percent interest per annum thereon from February 1, 1988, until paid.

CHARLES J. KOENIG JR. d/b/a C. J. KOENIG & SON v. BOBBY G. LEDFORD d/b/a FRESCO PRODUCE CO.
PACA Docket No. RD-88-486.
Default Order Issued October 26, 1988.

Respondent was ordered to pay complainant, as reparation, $20,645.15, plus 13 percent interest per annum thereon from January 1, 1988, until paid.

SAMUEL J. LONG d/b/a T & S LONG AGRICULTURAL SERVICES v DUER PRODUCE FARMS INC.
PACA Docket No. RD-88-458.
Default Order Issued October 6, 1988.

Respondent was ordered to pay complainant, as reparation, $5,200.00, plus 13 percent interest per annum thereon from October 1, 1987, until paid.

MERRILL FARMS v. SKLARZ PRODUCE CO. INC.
PACA Docket No. RD-88-488.
Default Order Issued October 26, 1988.

Respondent was ordered to pay complainant, as reparation, $12,855.00, plus 13 percent interest per annum thereon from February 1, 1988, until paid.

MID-ATLANTIC PRODUCE SALES INC. v. PRODUCE COUNTRY.
PACA Docket No. RD-88-481.
Default Order Issued October 25, 1988.

Respondent was ordered to pay complainant, as reparation, $2,085.00, plus 13 percent interest per annum thereon from December 1, 1987, until paid.

FRANK MINARDO INC. v. INTERNATIONAL PRODUCE (U S A) INC.
PACA Docket No. RD-88-471.
Default Order Issued October 12, 1988.

Respondent was ordered to pay complainant, as reparation, $25,991.46, plus 13 percent interest per annum thereon from November 1, 1987, until paid.

MITT PARKER COMPANY INC. v. RESTAURANT SERVICE INC.
PACA Docket No. RD-88-493.
Default Order Issued October 27, 1988.

Respondent was ordered to pay complainant, as reparation, $24,352.56, plus 13 percent interest per annum thereon from February 1, 1988, until paid.

MJW STORAGE INC. a/t/a GEORGE BROS. INC. v. INTERNATIONAL PRODUCE (U S A) INC.
PACA Docket No. RD-88-472.
Default Order issued October 12, 1988.

Respondent was ordered to pay complainant, as reparation, $15,155.50, plus 13 percent interest per annum thereon from December 1, 1987, until paid.

KEN PARKS CO. INC. v. L. R. MORRIS PRODUCE EXCHANGE INC.
PACA Docket No. RD-88-492.
Default Order issued October 26, 1988.

Respondent was ordered to pay complainant, as reparation, $31,715.95, plus 13 percent interest per annum thereon from November 1, 1987, until paid.

RED HAWK FARMS INC. v. CENTRAL PRODUCE CO. INC.
PACA Docket No. RD-88-467.
Default Order issued October 6, 1988.

Respondent was ordered to pay complainant, as reparation, $25,154.90, plus 13 percent interest per annum thereon from January 1, 1988, until paid.

RED STAR WISCONSIN CABBAGE INC. v. GREAT PLAINS BROKERAGE INC.
PACA Docket No. RD-88-445.
Default Order Issued October 4, 1988.

Respondent was ordered to pay complainant, as reparation, $1,980.00, plus 13 percent interest per annum thereon from September 1, 1987, until paid.

SAGINAW BAY POTATO CO-OP INC. v. CENTRAL PRODUCE CO. INC.
PACA Docket No. RD-88-490.
Default Order Issued October 26, 1988.

Respondent was ordered to pay complainant, as reparation, $9,037.00, plus 13 percent interest per annum thereon from October 1, 1987, until paid.

SANDIA DISTRIBUTORS INC. v. PAT PEREZ PRODUCE CO. INC.
PACA Docket No. RD-88-470.
Default Order Issued October 12, 1988.

Respondent was ordered to pay complainant, as reparation, $3,489.15, plus 13 percent interest per annum thereon from February 1, 1988, until paid.

SPUD EXPRESS v. SMITH PRODUCE INC.
PACA Docket No. RD-88-496.
Default Order Issued October 27, 1988.

Respondent was ordered to pay complainant, as reparation, $1,977.50, plus 13 percent interest per annum thereon from February 1, 1988, until paid.

STRUBE CELERY & VEGETABLE CO. v. FARBER FRUIT CO. INC.
PACA Docket No. RD-88-483.
Default Order issued October 25, 1988.

Respondent was ordered to pay complainant, as reparation, $1,571.82, plus 13 pereent interest per annum thereon from January 1, 1988, until paid.

SUNBELT TOMATO SALES INC. v. WHOLESALE PRODUCE CO. INC.
PACA Docket No. RD-88-479.
Default Order issued October 25, 1988.

Respondent was ordered to pay complainant, as reparation, $15,912.00, plus 13 percent interest per annum thereon from Deeember 1, 1987, until paid.

TOMOOKA FARMS INC. v. SMITHPRO BROKERAGE INC.
PACA Docket No. RD-88-448.
Default Order Issued October 4, 1988.

Respondent was ordered to pay complainant, as reparation, $930.00, plus 13 percent interest per annum thereon from November 1, 1987, until paid.

VAN De WALLE VEGETABLE INC. v. JOHN ORTEGA d/b/a EL RANCHO PRODUCE.
PACA Docket No. RD-88-461.
Default Order Issued October 6, 1988.

Respondent was ordered to pay complainant, as reparation, $4,788.00, plus 13 percent interest per annum thereon from October 1, 1987, until paid.

VAL-MEX FRUIT COMPANY INC. v. EDWARDO FLORES, JR.
PACA Docket No. RD-88-498.
Default Order issued October 27, 1988.

Respondent was ordered to pay complainant, as reparation, $2,650.00, plus 13 percent interest per annum thereon from January 1, 1988, until paid.

VEG-A-MIX v. JAMES W. BUCHANAN d/b/a J. BUCHANAN CO.
PACA Docket No. RD-88-446.
Default Order issued October 4, 1988.

Respondent was ordered to pay complainant, as reparation, $2,507.00, plus 13 percent interest per annum thereon from October 1, 1987, until paid.

WALKER FRUIT & PRODUCE INC. v. MITSUGU TANITA AND WAYNE WOOD d/b/a MITS TANITA SALES.
PACA Docket No. RD-88-464.
Default Order Issued October 6, 1988.

Respondent was ordered to pay complainant, as reparation, $24,593.00, plus 13 percent interest per annum thereon from October 1, 1987, until paid.

WINTER GARDEN GROWERS INC. v. LOUIS DESPAUX AND CARL G. PORCHE JR. d/b/a LUCKY US.
PACA Docket No. RD-88-495.
Default Order Issued October 27, 1988.

Respondent was ordered to pay complainant, as reparation, $1,330.00, plus 13 percent interest per annum thereon from June 1, 1987, until paid.

GWIN WHITE & PRINCE INC. v. L. R. MORRIS PRODUCE EXCHANGE INC.
PACA Docket No. RD-88-502.
Default Order Issued October 27, 1988.

Respondent was ordered to pay complainant, as reparation, $9,662.00, plus 13 percent interest per annum thereon from December 1, 1987, until paid.

In re: WILEY PRENTICE.
P.Q. Docket No. 161.
Decision and Order filed October 27, 1988.

Equal Access to Justice Act - APA notice and comment requirement.

The Judicial Officer awarded attorney fees and other expenses under the Equal Access to Justice Act in the amount of $4,834.44. The Equal Access to Justice Act provides for an award of attorney fees (not to exceed $75 per hour unless authorized by the agency's regulations) and other expenses to the prevailing party only if the position of the agency was not "substantially justified," and there are no "special circumstances" that make an award unjust. Complainant's position was not substantially justified for the reasons set forth in the original decision herein filed August 12, 1987. Under the Administrative Procedure Act (APA), before a regulation is adopted imposing requirements on members of the public, the agency must engage in notice-and-comment rulemaking, giving the public an opportunity to be heard (unless one of the exceptions apply, or more formal rulemaking is required, which is not the case here). Respondent's defense was not so unique that complainant could reasonably have proceeded with the case, not thinking of such a defense. There are no special circumstances that make an award of attorney fees and expenses unjust.

Jaru Ruley, for Complainant.
Stephen Glassman, Los Angeles, CA, for Respondent.
Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

ORDER AWARDING ATTORNEY FEES AND OTHER EXPENSES

This is a proceeding under the Equal Access to Justice Act, as amended (5 U.S.C. § 504), for an award of attorney fees and other expenses in connection with *In re Prentice*, 46 Agric. Dec. ____ (Aug. 12, 1987). On December 29, 1987, Chief Administrative Law Judge Victor W. Palmer (ALJ) filed an Initial Decision rejecting respondent's application for attorney fees and other expenses on the ground that complainant's position was substantially justified.

On February 26, 1988, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35).[1] On April 20, 1988, the case was referred to the Judicial Officer for decision.

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[1] The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

WALKER FRUIT & PRODUCE INC. v. MITSUGU TANITA AND WAYNE WOOD d/b/a MITS TANITA SALES.
PACA Docket No. RD-88-464.
Default Order issued October 6, 1988.

Respondent was ordered to pay complainant, as reparation, $24,593.00, plus 13 percent interest per annum thereon from October 1, 1987, until paid.

WINTER GARDEN GROWERS INC. v. LOUIS DESPAUX AND CARL G. PORCHE JR. d/b/a LUCKY US.
PACA Docket No. RD-88-495.
Default Order issued October 27, 1988.

Respondent was ordered to pay complainant, as reparation, $1,330.00, plus 13 percent interest per annum thereon from June 1, 1987, until paid.

GWIN WHITE & PRINCE INC. v. L. R. MORRIS PRODUCE EXCHANGE INC.
PACA Docket No. RD-88-502.
Default Order issued October 27, 1988.

Respondent was ordered to pay complainant, as reparation, $9,662.00, plus 13 percent interest per annum thereon from December 1, 1987, until paid.

In re: WILEY PRENTICE.
P.Q. Docket No. 161.
Decision and Order filed October 27, 1988.

Equal Access to Justice Act - APA notice and comment requirement.

The Judicial Officer awarded attorney fees and other expenses under the Equal Access to Justice Act in the amount of $4,834.44. The Equal Access to Justice Act provides for an award of attorney fees (not to exceed $75 per hour unless authorized by the agency's regulations) and other expenses to the prevailing party only if the position of the agency was not "substantially justified," and there are no "special circumstances" that make an award unjust. Complainant's position was not substantially justified for the reasons set forth in the original decision herein filed August 12, 1987. Under the Administrative Procedure Act (APA), before a regulation is adopted imposing requirements on members of the public, the agency must engage in notice-and-comment rulemaking, giving the public an opportunity to be heard (unless one of the exceptions apply, or more formal rulemaking is required, which is not the case here). Respondent's defense was not so unique that complainant could reasonably have proceeded with the case, not thinking of such a defense. There are no special circumstances that make an award of attorney fees and expenses unjust.

Jaru Ruley, for Complainant.
Stephen Glassman, Los Angeles, CA, for Respondent.
Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

ORDER AWARDING ATTORNEY FEES AND OTHER EXPENSES

This is a proceeding under the Equal Access to Justice Act, as amended (5 U.S.C. § 504), for an award of attorney fees and other expenses in connection with *In re Prentice*, 46 Agric. Dec. ____ (Aug. 12, 1987). On December 29, 1987, Chief Administrative Law Judge Victor W. Palmer (ALJ) filed an Initial Decision rejecting respondent's application for attorney fees and other expenses on the ground that complainant's position was substantially justified.

On February 26, 1988, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35).[1] On April 20, 1988, the case was referred to the Judicial Officer for decision.

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[1] The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

For the reasons set forth below, I am awarding respondent $4,834.4 attorney fees and expenses (attorney fees for 50 hours at $75 per h ($3,750) plus $1,084.44 for other expenses).

Since this is the first case in which an application for attorney fees other expenses has come before the Judicial Officer, and since an awar being made in this case even though the ALJ ruled in favor of Department in the original disciplinary proceeding and in the present Eq Access to Justice Act proceeding, it is important that the entire factual setti be set forth in this document, hopefully to preclude the filing of a flood similar applications by private litigants who might otherwise think an aw of attorney fees and other expenses is readily obtainable. Accordingly, leng excerpts from relevant documents are set forth herein so that the discuss of the Equal Access to Justice Act issue can be related to the prec circumstances of this case.

Findings of Fact

1. Respondent was the prevailing party in an adversary adjudicati instituted by complainant. *In re Prentice*, 46 Agric. Dec. ____ (Aug. 12, 198

2. (a) The application filed by respondent seeks payment of an hou rate of $150 per hour, which is higher than the $75 per hour specifically s forth in the Equal Access to Justice Act and the regulations.

(b) The application also fails to contain the information ordinar required to examine the reasonableness of the hourly rate requested f attorney's fees. However, respondent's attorney, Mr. Glassman, practices Los Angeles, California, where an attorney of his ability normally comman a rate considerably higher than $75 per hour and, therefore, the maximu rate of $75 per hour authorized by the regulations is the appropriate one t use for setting his fees under the Equal Access to Justice Act.

(c) Mr. Glassman's application and Notice of Appeal supports h assertion that he spent 50 hours on the preparation, trial and briefing o respondent's case, which, at the rate of $75 per hour, equals $3,750.

(d) In addition, Mr. Glassman's itemized expenses of $1,084.44 ar of the kind for which an attorney ordinarily charges his clients separately, an are reasonable.

Conclusions of Law

1. The position of complainant in the adversary adjudication referred to in Finding 1 was not substantially justified.

2. There are no special circumstances that make an award of attorney fees and other expenses unjust.

Discussion

I. The Equal Access to Justice Act.

The Equal Access to Justice Act provides for an award of attorney fees (not to exceed $75 per hour unless authorized by the agency's regulations) and other expenses to the prevailing party only if the position of the agency was not "substantially justified," and there are no "special circumstances [that] make an award unjust." The Act provides (5 U.S.C. § 504(a), (b) (Supp. III 1985)):

§ 504. Costs and fees of parties

(a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

(2) A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from any attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified. When the United States appeals the underlying merits of an adversary adjudication, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made under this section until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.

(3) The adjudicative officer of the agency may reduce the amount to be awarded, or deny an award, to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy. The decision of the adjudicative officer of the agency

under this section shall be made a part of the record containing th final decision of the agency and shall include written findings an conclusions and the reason or basis therefor. The decision of th agency on the application for fees and other expenses shall be the fina administrative decision under this section.

(b)(1) For the purposes of this section--

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $75 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee.); . . . .

The Equal Access to Justice Act is explained in Campbell, *The Packers a Stockyards Act Regulatory Program*, in 1 Davidson, Agricultural Law, § 3.24 (1988 Cum. Supp.), as follows:

§ 3.24A --Award of Fees and Expenses (New)

Under the Equal Access to Justice Act, certain prevailing parties in adversary adjudication may be awarded fees and expenses, including reasonable expenses of expert witnesses and attorney's fees. 5 USC § 504 (1982). The act applies to proceedings pending on October 1, 1981, or commenced on or after that date. The act had a sunset provision under which 5 USC § 504 (1982) was repealed effective October 1, 1984, except that it continued to apply through the final disposition of any adversary adjudication initiated before that date. 5 USC § 504, note "Repeal of Section" (1982). However, the sunset provision was repealed and the act was made permanent in 1985, with retroactive effect. Act of Aug 5, 1985, Pub L No 99-80, §§ 6, 7, 99 Stat 183, 186.

Fees and expenses are awarded only in an *adversary adjudication*, which is defined as an adjudication under 5 USC § 554 in which the government is represented by counsel or otherwise, but excluding rate proceedings or proceedings for granting or renewing a license. 5 USC § 504(b)(1)(C) (1982), as amended by Act of Aug 5, 1985, Pub L No 99-80, § 1(c)(2), 99 Stat 183, 184.

Fees and expenses relating to an administrative proceeding cannot be awarded to the United States, 5 USC § 504(a)(1) (1982), as amended by Act of Aug 5, 1985, Pub L No 99-80, § 1(a)(1), (2), 99 Stat 183; to an individual whose net worth exceeded $2 million at the time the adversary adjudication was initiated; or to any owner of an unincorporated business, or any partnership, corporation, association, or organization, with a net worth of over $7 million or more than 500 employees when the adversary adjudication was initiated. 5 USC § 504(b)(1)(B) (1982), as amended by Act of Aug 5, 1985, Pub L No 99-80, § 1(c)(1)(B), 99 Stat 183, 183-84. "'Net worth' is calculated by subtracting total liabilities from total assets." HR Rep No 1418, 96th Cong, 2d Sess 15, *reprinted in* [1980] 5 US Code & Cong Ad News 4984, 4994. "In determining the value of assets, the cost of acquisition rather than fair market value should be used." *Id.* Charitable organizations exempt from taxation under § 501(a) of the Internal Revenue Code and cooperative associations as defined in the Agricultural Marketing Act are exempt from the foregoing limitations. 5 USC § 504(b)(1)(B) (1982), as amended by Act of Aug 5, 1985, Pub L No 99-80, § 1(e)(1)(B), 99 Stat 183, 183-84.

An award of fees and expenses will not be made if the adjudicative officer of the agency finds that the position of the agency was "substantially justified or that special circumstances make an award unjust." 5 USC § 504(a)(1) (1982), as amended by Act of Aug 5, 1985, Pub L No 99-80, § 1(a)(1), (2), 99 Stat 183. The legislative history explains that an award of fees and expenses is not to be made merely because the government lost the case, but only where the government had no reasonable basis in law or fact for bringing the case. Specifically, it is stated in the House Report (HR Rep No 1418, 96th Cong, 2d Sess 10-11 (1980), *reprinted in* [1980] 5 US Code Cong & Ad News 4984, 4989-90):

> The test of whether or not a Government action is substantially justified is essentially one of reasonableness. Where the Government can show that its case had a reasonable basis both in law and fact, no award will be made. In this

regard, the strong deterrents to contesting Government action require that the burden of proof rest with the Government. This allocation of the burden, in fact, reflects a general tendency to place the burden of proof on the party who has readier access to and knowledge of the facts in question. The committee believes that it is far easier for the Government, which has control of the evidence, to prove the reasonableness of its action than it is for a private party to marshal the facts to prove that the Government was unreasonable.

Certain types of case dispositions may indicate that the Government action was not substantially justified. A court should look closely at cases, for example, where there has been a judgment on the pleading or where there is a directed verdict or where a prior suit on the same claim had been dismissed. Such cases clearly raise the possibility that the Government was unreasonable in pursuing the litigation.

The standard, however, should not be read to raise a presumption that the Government position was not substantially justified, simply because it lost the case. Nor, in fact, does the standard require the Government to establish that its decision to litigate was based on a substantial probability of prevailing. Furthermore, the Government should not be held liable where "special circumstances would make an award unjust." This "safety valve" helps to insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts. It also gives the court discretion to deny awards where equitable considerations dictate an award should not be made.

The term *prevailing party* is explained in the legislative history as follows (HR Rep No 1418, 96th Cong, 2d Sess 11, *reprinted in* [1980] 5 US Code Cong & Ad News 4984, 4990):

Under existing fee-shifting statutes, the definition of prevailing party has been the subject of litigation. It is the committee's intention that the interpretation of the term in S. 265 be consistent with the law that has developed under existing statutes. Thus, the phrase "prevailing party" should not be limited to a victor only after entry of a final judgment following a full trial on the merits. A party may be deemed prevailing if he obtains a favorable settlement of his case, *Foster v. Boorstin*, 561 F.2d 340 (D.C. Cir. 1977); if the plaintiff has sought a

voluntary dismissal of a groundless complaint, *Corcoran v. Columbia Broadcasting System, Inc.*, 121 F.2d 575, (9th Cir. 1941); or even if he does not ultimately prevail on all issues, *Bradley v. School Board of the City of Richmond*, 416 U.S. 696 (1974).

In cases that are litigated to conclusion, a party may be deemed "prevailing" for purposes of a fee award in a civil action prior to the losing party having exhausted its final appeal. A fee award may thus be appropriate where the party has prevailed on an interim order which was central to the case, *Parker v. Matthews*, 411 F. Supp. 1059, 1064, (D.D.C. 1976), or where an interlocutory appeal is "sufficiently significant and discrete to be treated as a separate unit", *Van Hoomissen v. Xerox Corp.*, 503 F.2d 1131, 1133 (9th Cir. 1974).

A party seeking an award of fees and expenses must file an application with the agency within 30 days of a final disposition of the adjudication. 5 USC § 504(a)(2) (1982), as amended by Act of Aug 5, 1985, Pub L No 99-80, § 1(b), 99 Stat 183. The department's rules of practice relating to awards under the Equal Access to Justice Act are published in 7 CFR § 1.180 et seq.

A party who is dissatisfied with the agency's fee determination may, within 30 days of the determination, appeal the determination to the court of the United States having jurisdiction to review the final decision. 5 USC § 504(c)(2) (1982), as amended by Act of Aug 5, 1985, Pub L No 99-80, § 1(d), 99 Stat 183, 184. The court may "modify the determination . . . only if the court finds that the failure to make an award . . ., or the calculation of the amount of the award, was unsupported by substantial evidence." *Id.*

It is the position of the department that if a court has reviewed the judicial officer's decision in a proceeding, only the reviewing court, rather than the judicial officer, can award fees and expenses under the Equal Access to Justice Act. *See* 5 USC § 504(c)(1) (1982), 28 USC § 2412(d)(3) (1982).

See § 3.31 (this supplement) for a further discussion relating to the Equal Access to Justice Act, added at the end of § 3.31.

In a further discussion of those provisions of the Equal Access to Justice Act relating to fees and expenses in judicial proceedings (which expressly authorize attorney fees in excess of $75 per hour (28 U.S.C. § 2412(d)(2)(A))), it is stated in Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 Davidson, Agricultural Law, § 3.31 (1988 Cum. Supp.):

> The Equal Access to Justice Act, referred to in § 3.24A (this supplement), makes changes in the fees and expenses that may be awarded in an action for judicial review of an adversary adjudication. 28 USC § 2412 (1982), as amended by Act of Aug 5, 1985, Pub L No 99-80, § 2, 99 Stat 183, 184-86. However, since the act and its legislative history are somewhat ambiguous, it is not certain how the act will be interpreted.
>
> . . . .
>
> In *Pierce v Underwood*, 108 S Ct 2541, 2546-49 (1988), the Court held that in reviewing an award of attorney's fees under 28 USC § 2412(d)(1)(A), the court of appeals correctly applied an abuse-of-discretion standard, rather than a *de novo* standard of review. The Court further held that the statutory phrase "substantially justified" does not mean justified to a high degree, but rather, justified in substance or in the main, i.e., to a degree that could satisfy a reasonable person, *id* at 2549-51. In addition, the Court held that attorney's fees in excess of $75 per hour should not be awarded merely because the rates for all lawyers in the relevant city exceed that amount, or merely because of the novelty and difficulty of issues, the undesirability of the case, the work and ability of counsel, the results obtained, or the contingent nature of the fee, *id* at 2553-55.

II. Complainant's Position Was Not Substantially Justified.

Almost all of the Judicial Officer's Decision filed August 12, 1987, is directly relevant to my determination that the Department had no reasonable basis in law or fact for bringing this case. The relevant provisions of the Judicial Officer's Decision filed August 12, 1987, are set forth in the following subsection. Since the quoted material is so lengthy, it is not set forth indented, or with quotation marks, which ordinarily would have been done for quoted material.

A. Excerpts from Judicial Officer's Original Decision.

This is a proceeding under the Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C. §§ 151-164a, 167), and regulations promulgated thereunder (7 C.F.R. § 318.13 *et seq.*), in which Administrative Law Judge Victor W. Palmer (ALJ) filed an initial Decision and Order on December 23, 1986, assessing a civil penalty of $250 against respondent for failing to present one piece of baggage in his possession at Honolulu International Airport for the required inspection.

. . . .

For the reasons set forth below, complainant has failed to prove a violation, and the complaint is dismissed with prejudice.

Findings of Fact

1. The respondent, Wiley E. Prentice, is an individual with a mailing address of Box 303, Anahola, Hawaii 96703.

2. The respondent has been a crew member (i.e., a pilot) for Western Airlines for approximately 19 years.

3. From 14 years of flying to and from Hawaii, the respondent was aware of the procedure that crew members destined to the continental United States from Hawaii were to have their baggage inspected at a particular agriculture inspection station, which is at the baggage check-in table in front of each airline's ticket counter. Each airline furnishes a daily list of its crew members for each flight to the agriculture inspector, and the inspector checks off the crew members' names as they are inspected.

4. The agriculture inspector at the baggage check-in table in front of each airline's ticket counter inspects all of the baggage of crew members, but only the check-in baggage of passengers. The hand-carried baggage of passengers is inspected by an agriculture inspector at the Security Check Point, where passengers are simultaneously checked by a security officer and an agriculture inspector. The hand-carried baggage of passengers is X-rayed, and one monitor of the X ray is read by a security officer and a separate monitor of the X ray is read by an agriculture inspector. Crew members in uniform are permitted to bypass the inspectors at the Security Check Point without having their hand-carried baggage inspected either by the security officer or the agriculture inspector at that point.

5. On September 1, 1982, all airlines serving Honolulu (with connections to the continental United States or other designated points) were notified by complainant that effective September 9, 1982, there would be a 100% check-in baggage marking system in effect. The notice states (CX A):

This is to inform you that effective September 9, 1982, we will implement the proposed 100% check-in baggage marking system to preclude uninspected baggage from leaving Hawaii to the U. S. Mainland. All check-in baggage that have gone through our inspection, whether inspected or not, will be marked with colored stickers in areas visible to your employees.

Cooperation from your employees at the baggage check-in counters is mandatory. They must call to our attention all passengers with unmarked baggage or refer passengers back to our inspection counters for inspection. Our Officer will be roving back and forth to see that all baggage are marked; however, he/she may miss a few. In this event, our Officer can be signaled with the light system that DOT will install. When a passenger is referred to our Officer, he/she may interrogate passenger and sticker baggage or send passenger back to our counters for inspection. Please be forewarned that, in most cases, passengers will be sent back to our inspection counters for inspection due to the lack of adequate space and facility at all check-in counters. We will not examine baggage on the floor.

We will also monitor all baggage make up areas for uninspected or unmarked baggage. Our Officer will pull off all uninspected or unmarked baggage for inspection. Your supervisor will be contacted to open baggage for inspection. Baggage will be inspected only in the presence of a supervisor or designee. In no case will we allow uninspected baggage, which is suspected of carrying contraband, to go forward to the Mainland. Our Officer assigned to monitor the baggage make up area will use his/her discretion in making decisions, based on risk factors, whether to release without inspection or hold for inspection.

All hand-carried items will be inspected at the Security Checkpoints in order to provide relief at our inspection counters for this time-consuming process of marking every check-in baggage.

Please acknowledge receipt of this letter by signing and dating the attached copy and returning it to us in the enclosed stamped self-addressed envelope.

6. On March 9, 1983, complainant advised the airlines serving Honolulu that some airline employees were bypassing agricultural inspection. The letter states (CX C):

> It has come to our attention that a few airline employees are bypassing agricultural inspection when traveling to the mainland. They have used office spaces and security doors accessible to them when working to bypass the inspection.
>
> Whether they fly on passes or are deadheading, our regulations still apply and their baggage must be presented for inspection. All employees should be reminded, for violations could be filed.

7. The agriculture inspector has discretion as to whether to open baggage presented for inspection, or whether to merely question the person as to the contents of the baggage. Any baggage presented to the inspector has been "inspected," irrespective of whether the inspector opens the baggage.

8. In order to facilitate the inspection process, complainant has defined "sterile" areas, and notified interested parties, including all airline carriers serving Honolulu, of the sterile areas. The notice dated March 7, 1985, is as follows (the "second level area" is of particular importance here inasmuch as that is the level at which the baggage check-in points and Security Check Points for departing passengers are located) (CX D):

> This will make a matter of record and define "sterile" areas for USDA, APHIS, PPQ quarantine purposes.
>
> For the enforcement of Federal Regulations 7 CFR §§ 318.13, 318.16, 318.30, 318.47, 318.60, and 301.87, all baggage (hold and hand-carried), and cargo must be inspected and released by an Officer of the United States Department of Agriculture prior to being accepted by the airlines for transport from Hawaii to the Continental United States. To facilitate the movement, the following areas will be considered "sterile" for USDA purposes:
>
> 1. All hold baggage assembling areas of each airline. This includes all ground level areas with the capability of accepting hold baggage on conveyor belts from the second floor level and the interline baggage assembling area located at the interisland terminals.

2. The entire second level area beyond the Security Checkpoints which encompasses the Ewa and Diamond Head Gull Wings, the Central Concourse, and all walkways leading to these areas and the Main Terminal Shopping and Lounge areas.

3. The entire ground level area beyond all Airport Access Entry Gates, aircraft parking areas, and ramp areas in general, delineated by the Diamond Head Gull Wing on one side and the Ewa Gull Wing on the other side.

Uninspected baggage (includes hand-carried items) and/or cargo which do not meet our requirements in any of the above-mentioned area will be cause for our Officers to file violation reports. Each violation will be subject to a Civil Penalty of up to $1,000.00 and/or a Criminal Penalty of up to $5,000.00 or a year in jail, for the individual, the agent, and the airline involved.

Please remind all of your employees that we are and have been monitoring all areas and all violations will be processed for prosecution.

To prevent the spread of fruit flies and other dangerous plant pests (which occur in Hawaii, but not in the Continental U.S.) that could endanger our nation's multibillion dollar agricultural industry, we must apply strict quarantine measures to prevent host fruits and vegetables and other plant material from being transported to the Continental U.S.

Your cooperation is requested in this matter.

9. On August 13, 1985, the respondent's name, along with names of other Western Airlines crew members destined from Hawaii to the continental United States, was on a list at the designated agriculture inspection station in front of Western Airlines' ticket counter. Respondent's flight was originally scheduled to depart at 11:25 p.m. (or 11:55 p.m.), but during the evening it was rescheduled to depart at 12:25 a.m.

10. Shortly after 11:00 p.m. on August 13, 1985, when the respondent had not reported to the designated agriculture inspection station for inspection of his baggage or personal effects, the agriculture inspector, Dr. Thomas D. Arkle, Jr., had respondent paged at the Western Airlines Operations area. Sometime between 11:15 p.m. and 11:45 p.m., respondent came to the area of the designated inspection station, and his baggage, which consisted of a briefcase, i.e., an attache-type airline case, containing no contraband, was inspected by Dr. Arkle.

11. Prior to being paged by Dr. Arkle, respondent had arrived at the Honolulu airport several hours early, at approximately 8:00 p.m. He was accompanied by Dr. Clarence Greff, Jr., whom he had met on his incoming flight to Hawaii. Respondent was dressed in civilian clothes. In order to eat dinner in a restaurant which was within the sterile area, respondent and Dr. Greff went through the Security Check Point where their baggage, including respondent's briefcase, was inspected and X-rayed by the security officer and the agriculture inspector. After leaving Dr. Greff at about 9:15 p.m. to 9:30 p.m., respondent went to the Western Airlines Operations area, which is in the same sterile area as the restaurant. Respondent did some work in the Western Airlines Operations area, changed into his uniform, and then fell asleep until about 11:00 p.m. Respondent intended to go back to the designated inspection station to have his baggage inspected again, but he forgot to do so until he was paged by Dr. Arkle. Respondent did not leave the sterile area from the time he entered it at approximately 8:00 p.m. until he left it to respond to Dr. Arkle's paging.

Conclusions

In order to prevent catastrophic damage to the agricultural community in the United States, and those dependent upon it, Hawaii has been quarantined. The notice of quarantine states (7 C.F.R. § 318.13):

> § 318.13 Notice of quarantine.
>
> (a) Pursuant to section 8 of the Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C. § 161), and after public hearing, it has been determined that it is necessary to quarantine Hawaii to prevent the spread of dangerous plant diseases and insect infestations, including the Mediterranean fruit fly . . ., the melon fly . . ., the oriental fruit fly . . ., green coffee scale . . ., the bean pod borer . . ., the bean butterfly . . ., the Asiatic rice borer . . ., the mango weevil . . ., the Chinese rose beetle . . ., and a cactus borer . . ., which are new to or not widely prevalent or distributed within and throughout the United States, and Hawaii is therefore quarantined.

As a result of the quarantine, complainant inspects baggage and cargo coming from Hawaii to the continental United States and other specified designations. The inspection regulations provide (7 C.F.R. §§ 318.13-12; emphasis added):

§ 318.13-12 Inspection of baggage and cargo.

(a) Baggage inspection. *All baggage and other personal effects of* passengers and *members of crews on* ships, vessels, other surface craft or *aircraft moving from Hawaii shall be subject to examination by an inspector* to ascertain if they contain any of the articles or plant pests prohibited movement by the quarantine and regulations in this subpart or Part 330 of this chapter. Such baggage inspection shall be made, at the discretion of the inspector, on the dock or on the ship, vessel, other surface craft or aircraft while in a quarantine or inspection area, either at the port of departure in Hawaii or at the first or any subsequent port of arrival in the continental United States, Guam, Puerto Rico, or the Virgin Islands of the United States, and no baggage or other personal effects of passengers or crew members from Hawaii shall be released until said effects have been inspected and passed. Baggage inspections will not be performed until the person in charge or possession of the carrier ship, vessel, other surface craft, or aircraft provides sufficient space and adequate facilities thereon, or on piers or landing fields for such inspection.

Complainant contends that respondent violated the regulation just quote by his conduct referred to in Findings 9-11. To prevail, complainant mu overcome a number of formidable barriers. The first sentence of th regulation is the critical sentence at issue here, i.e., the issue is whethe respondent violated the provision that "[a]ll baggage and other personal effect of . . . members of crews on . . . aircraft moving from Hawaii shall be subjec to examination by an inspector. . . ."

At the outset, we must inquire as to whether it is possible for anyone t violate that sentence of the regulation! That is, construing the sentence in normal manner, it merely states that baggage from Hawaii is liable to b inspected. The term "subject" is defined as follows (Webster's Third Ne International Dictionary 2275 (1981)):

1: falling under or submitting to the power or dominion of another (children -- to their parents): as a: owing allegiance to or being a subject of a particular sovereign or state (a colony is -- to the mother country) (a -- race) b: SUBJECTED c: OBEDIENT, SUBMISSIVE (be -- to the laws) 2 a: suffering a particular liability or exposure (-- to very severe draughts) (-- to temptation) b: PRONE, DISPOSED (very -- to colds) 3 *archaic* : situated under or below : SUBJACENT 4: likely to be conditioned, affected, or modified in some indicated way : having a contingent relation to something and usu. dependent on such relation for final form, validity, or significance (democratic representatives whose acts are -- to discussion and criticism--M.R. Cohen) (a treaty -- to ratification) *syn see LIABLE.*

"The words 'subject to' normally connote, in legal parlance, an absence of personal obligation." *Commissioner v. Southwest Consolidated Corp.*, 315 U.S. 194, 200 (1942). As stated in *S.L. Nusbaum & Co. v. Atlantic Virginia Realty Corp.*, 146 S.E.2d 205, 209 (1966), 206 Va. 673:

> The courts have frequently construed the words "subject to." They are words of qualification and notice and not words of assumption.
>
> In S. T. McKnight Co. v. Central Hanover Bank & Trust Co., 120 F.2d 310, 320 (8 C.C.A.), this is said:
>
> "That the words 'subject to all the terms and conditions of said lease' do not impose contractual liability on an assignee to a lessor to carry out the covenants of a lease, seems to be the well supported rule."
>
> In 83 C.J.S. Subject, page 555, the expression "subject to" is defined as follows:
>
> "It normally connotes, in legal usage, an absence of personal obligation, and as ordinarily used does not create affirmative rights."

In *Fry v. Mayor & City Council of Sierra Vista*, 466 P.2d 41, 46 (1970), 11 Ariz. App. 490, the court stated:

> Whether or not this property was in fact ultimately subjected to taxation is immaterial, since the term "subject to taxation" merely means liable to taxation rather than that the property must be subjected to taxation.

Similarly, in *Huey v. King*, 415 S.W.2d 136, 139 (1967), 220 Tenn. 189, the court stated:

> Furthermore, it is significant that the charter merely provides that property of the kind in question shall be "subject to taxation." Again this provision cannot be construed as a mandate that such property *must* be taxed. This provision merely sets out the classes of property which are subject to the Board's discretion as to whether or not it shall be taxed.

In construing the regulation at issue here, it is well settled that the Administrator's interpretation of his own regulation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."

Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945), quoted with approval in *INS v. Stanisic*, 395 U.S. 62, 72 (1969), and *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965).

Complainant contends that the first sentence of the regulation just quoted, *viz.*: "All baggage and other personal effects of . . . members of crews on . . . aircraft moving from Hawaii shall be subject to examination by an inspector," properly interpreted, notifies passengers and crew members that their baggage is subject to examination by an agriculture inspector, and, also, places an affirmative duty on the passengers and crew members to place their baggage and personal effects before an inspector for inspection.

Notwithstanding the great weight that must be given to the Administrator's interpretation of his regulation, it is stretching the rules of statutory construction to the limit (or perhaps, beyond) to read an affirmative requirement into the first sentence of the quoted regulation. Nonetheless, in view of the importance of this case to the Nation's agricultural sector, and all those dependent upon it, and since (i) complainant's interpretation was brought to the attention of all airlines, and (ii) respondent was personally aware of the fact that complainant construes his regulation as requiring each crew member to present his or her baggage for inspection, I am willing to stretch the regulation to the point of imposing a requirement on passengers and crew members to present their baggage for inspection.[2] See *In re Warner*, 46 Agric. Dec. ____ (Apr. 1, 1987) (ruling on certified question) (passenger required to submit baggage for inspection).

Second, for complainant to prevail here, the regulation (7 C.F.R. § 318.13-12(a)) must be construed as requiring respondent to present his baggage for inspection before taking it aboard the plane. This, again, is a formidable barrier since the face of the regulation states that the inspector may inspect baggage on the aircraft or on the ground, and either before the plane leaves Hawaii or upon arrival in the continental United States.

It is difficult to construe that regulation as requiring a crew member to present his baggage for inspection prior to the time the baggage is carried aboard the aircraft. But here, again, since complainant's construction of the regulation has been brought to the attention of the airlines serving Hawaii, and respondent was personally aware of complainant's interpretation, I am willing to stretch the regulation to require respondent to present his baggage for inspection prior to carrying the baggage aboard the aircraft.

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[2] If a case is litigated involving a passenger, complainant would be well advised to explain in detail the steps that have been taken to make the public aware of this requirement, together with a picture of complainant's notice of the inspection requirement, and a diagram indicating every relevant location at which the notice appears. (I hope that complainant has "clarified" the regulations before the issue as to whether the regulation can be construed to impose an obligation on passengers or crew members is decided by a reviewing court.)

Third, for complainant to prevail here, the regulation must be stretched (by the interpretative process) to impose a duty on crew members to present their baggage at the designated baggage check-in station for their airline. This, too, is stretching the regulation to (or perhaps, beyond) the breaking point, but, again, since complainant's interpretation was given to all airlines serving Hawaii, and respondent was personally aware of this interpretation (or "protocol" as he calls it (Tr. 106-07)), I will accept complainant's construction of the regulation.

However, to be successful, complainant must prevail as to one of the remaining two issues. That is, the regulation must be construed either (i) to require respondent to check in at the designated baggage check-in table prior to a certain number of minutes before the scheduled departure time (the time-limit theory), or (ii) to make it unlawful for respondent to enter the sterile area after having his baggage inspected by the agriculture inspector at the Security Check Point, even if he later has his baggage inspected at the designated baggage check-in table (the prohibited-entry theory). I find no merit in complainant's position as to either issue.

First, as to the time-limit theory, complainant prevails here if the regulation is construed to require that a crew member check in at the designated baggage check-in station by a fixed time prior to departure time, e.g., 1¼ hours prior to departure. This is because after respondent passed through agricultural inspection at the Security Check Point at about 8:00 p.m., he forgot to check in at the designated baggage check-in station until he was paged by Dr. Arkle, a little more than an hour before the plane's rescheduled departure time.[3]

Although respondent had forgotten to check in at the designated baggage check-in station before he was paged by Dr. Arkle, it is possible that something might have triggered his memory, even without being paged. Notwithstanding the weight that must be afforded to the Administrator's interpretation of his own regulation, I am unwilling to stretch the regulation, by the process of interpretation (or, rather, by the abuse thereof), to interpolate a time requirement into the regulation. Accordingly, complainant cannot prevail on the theory that respondent violated the regulation because he waited until he was paged by Dr. Arkle to present his baggage for inspection at the designated baggage check-in station.

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[3] If the regulations were to be construed to require check in prior to a certain time period before departure, the time period would have to be based on the delayed, i.e., rescheduled departure time, rather than the original, scheduled departure time since many flights are delayed for substantial periods. A crew member staying at a hotel in Honolulu, e.g., might ascertain by a telephone call that his or her flight will be several hours late.

In this respect, there is no evidence in the record to indicate that complainant has ever advised the airlines that crew members must have their baggage inspected at the designated baggage check-in station by a fixed number of minutes before the scheduled, or rescheduled, departure time. Complainant's interpretation, in this respect, seems to be an afterthought, presented for the first time in his brief filed after the hearing in this proceeding (probably concocted after complainant gave up on the prohibited-entry theory).

Although complainant's brief filed before the ALJ is not crystal clear as to complainant's theory of the case, complainant seems to argue that respondent violated the regulation because he failed to present his baggage for inspection at the designated baggage check-in station before he was paged by Dr. Arkle. Complainant's brief states (Brief at 2-4, 7-8) (Note the absence of any prohibited-entry argument, i.e., complainant's brief is completely consistent with the view that no violation would have occurred if respondent had promptly returned to the designated inspection station after eating dinner and changing into his uniform in the sterile area):

> The respondent's Answer and evidence presented at the hearing in this matter establish that the Agency interpreted the regulation to require crew members of flights destined for the continental United States from Hawaii to report for agriculture inspection of baggage and personal effects at inspection stations designated for their particular airline; that the respondent was well aware of the Department of Agriculture's requirement that he, as a flight crew member, be inspected and checked at the agriculture inspection point designated for crew members of his particular airline; that this was at least the second time that the respondent had been called from his airline's operations control area for inspection at the proper agriculture inspection point; that these measures are necessary to prevent the artificial spread of plant diseases and pests from Hawaii to the continental United States; and that, in view of these circumstances, assessment of the proposed civil penalty is appropriate.
>
> Proposed Findings of Fact
>
> . . . .
>
> 3. From 14 years of flying Hawaii, the respondent was aware of the procedure that crew members destined to the continental United States from Hawaii were to check in at a particular agriculture inspection station.

4. That on August 13, 1986 [sic], the respondent's name, along with names of other Western Airline crew members destined from Hawaii to the Continental United States, was on a list at a designated agriculture inspection station.

5. That at approximately 2300 hours on August 13, 1985, the respondent had not reported to the designated agriculture inspection station for inspection of his baggage and/or personal effects.

6. That at approximately 2300 hours on August 13, 1986 [sic], the respondent was in the Western Airline operations area, within the defined "sterile" area.

7. That only after being summoned to have his baggage and/or personal effects inspected did the respondent report to the designated agriculture inspection station.

. . . .

Issues Presented

. . . .

I. The Agency's interpretation of section 318.13-12 of the regulations (7 C.F.R. §§ 318.13-12), requiring members of airline crews moving from Hawaii to the continental United States to subject their baggage and personal effects to examination by an inspector at a designated agriculture inspection station, is neither plainly erroneous nor inconsistent with the regulation.

. . . .

II. Respondent, Wiley E. Prentice, failed to subject his personal effects to examination by an inspector at a designated agriculture inspection station as required.

Testimony at the hearing clearly establishes that on August 13, 1985, Wiley E. Prentice, a Western Airlines crew member, did not present his briefcase for examination at the agriculture inspection station designated to examine baggage and other personal effects of Western Airlines' crew members. Mr. Clarence Greff, Jr. and the respondent testified that when they entered the main terminal (of

Honolulu International Airport) they went through a metal detector, which would have been the combined inspection station, and on to the restaurant inside the Terminal (Tr. 91-93, 95-96). Mr. Prentice further testified that after leaving the restaurant, he went directly to Western Operations within the sterile area (Tr. 98, C.Ex. D). It was not until some three hours later, after Mr. Thomas Arkle, Plant Protection and Quarantine Officer, called Western Operations to inquire as to the respondent's whereabouts, that Mr. Prentice reported to the agriculture inspection station for examination of his briefcase. (Tr. 55, 56, 101, 102). It should be pointed out that Mr. Arkle called Western Operations because the respondent's name, appearing on the crew member list provided by Western Airlines, had not been marked in any manner to indicate that Mr. Prentice had subjected his personal effects for examination at that inspection station. (Tr. 51, 52, 58).

In his answer and again in testimony, the respondent admits both his awareness of the inspection procedure for crew members and that on August 13, 1985, he failed to comply with such procedure until summoned from the "sterile" area within the Western Operation. (Tr. 101, 102, 111, 112). Therefore, it is clear that the respondent violated section 318.13-12 of Title 7 of the Code of Federal Regulations on August 13, 1985.

The last two paragraphs quoted above under subheading "II" constitute complainant's entire argument as to this point. Complainant's theory seems to be limited to the argument that respondent violated the regulation because he failed to have his baggage inspected at the designated inspection station until he was summoned by Dr. Arkle.

The ALJ, however, did not adopt the time-limit theory but, rather, adopted the prohibited-entry theory (which, as shown below, was complainant's original theory of the case). The ALJ's findings and conclusions closely follow complainant's findings and conclusions, except that the ALJ makes it clear that respondent's unlawful conduct occurred the moment he entered the sterile area without first having presented his baggage for inspection at the designated baggage check-in station. For example, the ALJ states (Initial Decision at 2-3; emphasis added):

The evidence of record establishes that the Agency interpreted the regulation to require crew members of flights destined for the continental United States from Hawaii to report for agriculture inspection of baggage and personal effects at inspection stations designated for their particular airline *before entering a so-called "sterile area" consisting of the airline's operations control area*; that the respondent was well aware of the Department of Agriculture's requirement that he, as a flight crew member, should present his

baggage for examination at the agriculture inspection point designated for crew members of his particular airline *before entering a "sterile area"*; that respondent did not present his briefcase for inspection at the designated inspection station until he was paged and *after he had entered the "sterile area"*; that this was the second time that the respondent had been called from his airline's operations control area for inspection at the proper agriculture inspection point; that these measures are necessary to prevent the spread of plant diseases and pests from Hawaii to the continental United States; and that, in view of these circumstances, assessment of a two hundred fifty dollars civil penalty, as proposed by complainant, is appropriate.

Findings of Fact

. . . .

3. From 14 years of flying Hawaii, the respondent was aware of the procedure that crew members destined to the continental United States from Hawaii were to check in at a particular agriculture inspection station *before entering a "sterile area" consisting of the airline's operations control area.*[4]

After the ALJ adopted the prohibited-entry approach, complainant expressly adopted it in opposing respondent's appeal, i.e., complainant argues that "there was substantial evidence to rebut the presumption of Respondent's compliance with the requirement that he present his baggage for examination at the designated agriculture inspection station prior to entering the airport's 'sterile area'" (Opposition to Respondent's Appeal at 4). That was undoubtedly complainant's original theory of the case since the "REPORT OF VIOLATION," which led to the institution of the complaint, states (RX 1 at 1-2, item 7):

[4] Finding 3 as proposed by complainant, i.e., without the emphasized language, is supported by the record. The ALJ's Finding 3 is not supported by the record. The ALJ's remaining findings are taken virtually verbatim from complainant's proposed findings, and the ALJ's conclusions closely follow complainant's conclusions. Specifically, the ALJ's conclusions under his subheading "II" are taken practically verbatim from complainant's conclusions under the subheading "II" quoted above. But the ALJ's specific findings and preliminary statements to the effect that it was unlawful for respondent to enter the sterile area before being inspected at the designated baggage check-in station give a completely different meaning to the ALJ's conclusions under subheading "II."

> [E]ach crew member is required to present all of his baggage for inspection and have his name "removed" from the list prior to entering tbe "sterile area" of the airport. . . . In this instance, . . . [respondent] did proceed directly into the sterile area of the airport to the Western Airlines operations office without clearing US agriculture predeparture inspection (see attached memos).

In addition, complainant presented evidence at the hearing expressing the view that it is unlawful for a crew member to enter the sterile area without first passing through the designated baggage check-in station (Tr. 20-22, 69-70, 72, 76-80).

Apparently, however, complainant abandoned the unlawful-entry theory[5] as a result of Dr. Arkle's admission that a crew member who arrives 3 to 4 hours before his flight, dressed in civilian clothes, may lawfully enter the sterile area by being inspected as if he were a passenger, i.e., at a Security Check Point. (This admission, emphasized in the quoted testimony below, was preceded by less specific testimony to the contrary.) Specifically, Dr. Arkle testified (Tr. 78-80; emphasis supplied):

> Q. But you are prepared to admit that there are circumstances when a crew member would be in the sterile area and have gone through an inspection; aren't you?
>
> A. Without --
>
> Q. Without being checked off.
>
> A. Not legally.
>
> Q. Excuse me?
>
> A. Not legally.

---

[5] In view of (i) the specific statements in the "REPORT OF VIOLATION" that it is unlawful for a crew member to enter the sterile area without first being inspected at the designated baggage check-in station, (ii) complainant's evidence to the same effect (Tr. 20-22, 69-70, 72, 76-80), and (iii) the ALJ's comment at the hearing that he agreed with complainant's theory that it is a violation for a crew member to enter the sterile area before having his name checked off at the designated baggage check-in station (Tr. 85-87), when complainant then filed a brief referring repeatedly to the requirement for a crew member to check in at a particular agriculture inspection station, but omitting the vital phrase (repeatedly added by the ALJ) "before entering a 'sterile area,'" the omission of that vital phrase must have been intentional! That phrase was originally the heart of complainant's case. Surely complainant's attorney could not have neglected, by oversight, to leave out the heart of the case in complainant's original brief.

Q. What is the illegality?

A. The crew member, we would have no control and no knowledge of whether or not the crew member had gone through an inspection simply because the crew member has access to areas of the airport without going through an inspection.

Q. So your presumption then, Mr. Arkle, is that every crew member is attempting to avoid Agricultural inspection?

A. No, sir.

Q. Is it your presumption that every crew member wants to go through Agricultural inspection?

A. Not that they want to, but that they do.

Q. That's fine. So your presumption is that every crew member does go through Agricultural inspection?

A. We have documented instances where they have not.

Q. No, no, Mr. Arkle. Your presumption is that every crew member does go through?

JUDGE PALMER: This is becoming very argumentative. Let us move on.

BY MR. GLASSMAN:

Q. *Is it possible for a crew member to report to the Airport prior to his flight, early, and go through inspection as if he were a passenger*?

A. *What is early*?

Q. *Three or four hours before his flight.*

A. *Is he in uniform*?

Q. *No. Civilian clothes.*

A. *Yes.*

Q. *And go through inspection?*

A. *Yes.*

Q. *And during that time he would be admitted to the sterile area legally, inspected and passed; correct?*

A. *If he were in civilian clothes, yes.*

Q. Now, suppose that same individual then changes into his uniform because he goes on duty, was not on duty at the time he entered the Airport but was on duty afterwards, changes into his uniform, and he is still in the sterile area. Is the presumption now that he has no longer been inspected?

A. No, sir.

Q. The presumption is he has been inspected?

A. The presumption is we have no knowledge of this person.

Q. Now, did you observe Mr. Prentice approach you after you called Operations?

A. Yes, sir.

Q. Where did he come from?

A. He came from the sterile area.

Q. And your immediate thought was: "Here is someone who has by-passed Ag inspection." Right?

A. My thought for several moments, prior to that, before I ever saw Mr. Prentice, was that he had by-passed Agricultural inspection.

Q. If you had been informed, if you had in fact been informed that he had gone through an Agricultural inspection, you would have said, "Okay. Check off the list and away you go."

A. No, sir.

Q. What would your procedure have been?

A. The normal procedure we would follow is to have that person report to the proper Agricultural inspection station and have his name removed from the list after presenting his baggage for inspection at that counter.

Q. Again, there is no regulation that requires that, only that he be inspected and passed?

A. Yes, sir.

Dr. Arkle's testimony (emphasized above) fits the facts of this case exactly. Respondent was not in uniform and was not on duty at 8:00 p.m. when he went through agricultural inspection at the Security Check Point 3 or 4 hours before his flight was originally scheduled for departure. (His original entry into the sterile area 3 or 4 hours early was for the purpose of eating dinner with an acquaintance at a restaurant in the sterile area.) When he went through the Security Check Point, including agricultural inspection, "as if he were a passenger," while in civilian clothes, he was "admitted to the sterile area legally, inspected and passed" (Tr. 79), according to Dr. Arkle.[6]

But if even Dr. Arkle had testified to the contrary, no amount of reasonable stretching can transmute the simple statement that a crew member's baggage "shall be subject to examination by an inspector" into a prohibition against entering the sterile area by means of the Security Check Point inspection (rather than the designated baggage check-in station), when the crew member has arrived several hours before the flight, is not on airline duty, and is not in uniform.

As to this issue, it is quite significant that complainant did not introduce into evidence the written instructions to the airlines setting forth the procedure to be followed by crew members in complying with complainant's inspection procedure. The omission of that vital document (or documents) is highlighted by the fact that other documents of far less significance (see

[6] It is doubtful whether respondent could have had his name checked off at the designated baggage check-in station while he was in civilian clothes. He testified that, after the incident involved in this case, he went to the designated baggage check-in station in civilian clothes, stating "I am Prentice. I'm on the list. I'm presenting myself for inspection," and that the inspector said, "I can't check you off because you are not in uniform" (Tr. 107). No rebuttal evidence was offered by complainant. (After respondent argued with the inspector and insisted that his name be checked off, it appears that the inspector did so (Tr. 107)). Since respondent's uniform was in the sterile area on August 13, 1985 (at Western Airlines Operations area), it is quite possible that he would not have been permitted by the inspector to have his name checked off until he entered the sterile area and obtained his uniform.

Findings 5-6, 8) were introduced into evidence by complainant. Although complainant's witnesses testified that the airlines had been advised of complainant's procedures, the most persuasive evidence, i.e., the written notices to the airlines, were not introduced into evidence by complainant as to the requirements for checking in at the designated baggage check-in station. Nothing in the record leads me to infer that the written notices expressly advised the airlines that it is unlawful for crew members to come to the airport several hours in advance of their flight, not in uniform, and enter the sterile area by means of a Security Check Point, without first going through the designated baggage check-in station.

If the airlines had been expressly advised of the unlawful-entry theory, i.e., that it is unlawful for crew members who arrive early in civilian clothes to proceed into the sterile area through the Security Check Point (where their baggage is inspected by an agricultural inspector), we would then have to decide whether the regulation could be stretched, by interpretation, to include such a prohibition. Nothing in this decision should be regarded as deciding, or suggesting, what the decision will be, if in a future case, complainant expressly advises the airlines of the unlawful-entry interpretation.[7]

For the foregoing reasons, I disagree with complainant's position here, in view of the present regulations (or, rather, lack thereof).[8] In this respect, I have no quarrel with complainant's view that all of the requirements and prohibitions which complainant seeks to enforce here are reasonable, i.e., there is a reasonable basis for including all of them in regulations. This is highlighted by the numerous violations detected by complainant. The interception by complainant of more than one million prohibited items per year is explained by Ron Hall, Office of Information, USDA, as follows (USDA News, Vol. 45, No. 9, at 3 (Oct. 1986):

. . . .

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[7] Complainant is, however, urged to put his requirements and prohibitions in writing in the Federal Register rather than to merely announce in the Federal Register that an inspection program is in effect, and depend on letters, memoranda, posters, etc., to fulfill complainant's duty to inform the public of obligations and prohibitions which, if violated, subject the public to civil penalties.

[8] Respondent may be entitled to an award of fees and expenses under the Equal Access to Justice Act (5 U.S.C. § 504 (Supp. III 1985)). I would not have advised respondent of that right except for the fact that the Department's regulations have not been amended since 1982, and they erroneously state that the Act is not in effect as to actions instituted after September 30, 1984 (7 C.F.R. § 1.182). In addition, the Department's regulations specifying the statutes under which awards of fees and expenses may be made does not list the Plant Quarantine Act (7 C.F.R. § 1.183(a)), notwithstanding the fact that civil penalties under the Plant Quarantine Act can only be assessed "after notice and an opportunity for an agency hearing on the record" (7 U.S.C. § 163), and, therefore, this proceeding is an "adversary adjudication" (5 U.S.C. § 504(b)(1)(C) (Supp. III 1985)), subject to an award for costs and fees (5 U.S.C. § 504(b)(1)(C) (Supp. III 1985)). Respondent may file an application for fees and expenses under the provisions of 7 C.F.R. § 1.180 *et seq.*, as if they were expressly applicable to this proceeding.

Notwithstanding the vital importance of complainant's inspection program, until the requirements and prohibitions are set forth in regulations with sufficient clarity to satisfy due process requirements, they cannot be enforced.

As stated in *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (footnotes omitted):

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. . . . Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."

Accord Connally v. General Const. Co., 269 U.S. 385, 391-95 (1926). This principle applies to statutes, regulations and orders. 16A Am. Jur. 2d *Constitutional Law* §§ 818 (1979).

For the foregoing reasons, the complaint must be dismissed. . . .

B. The Regulation Relied on by Complainant Cannot Reasonably Be Construed in a Manner That Would Make Respondent's Conduct Violative of the Regulation.

The Judicial Officer's decision previously filed herein explains in detail why there was no reasonable basis for complainant's position that respondent violated the regulation at issue in the case. As set forth above, the regulation merely provides that all baggage and other personal effects of passengers and members of crews "shall be subject to examination by an inspector. . . ." There is no reasonable basis for reading into that language either (i) the time-limit theory, i.e., that a crew member must check in at the designated baggage check-in table prior to a certain number of minutes before the scheduled departure time, or (ii) the prohibited-entry theory, i.e., that a crew member who arrives at the airport 3 or 4 hours before flight time, not on airline duty, dressed in civilian clothes, cannot enter the sterile area by having his baggage inspected by the Agriculture inspector at the Security Check Point, as if he

were a passenger, and that such entry into the sterile area is unlawful even if he later has his baggage inspected at the airline's designated baggage check-in table.

Although complainant and the ALJ relied on instructions given to the airlines amplifying the regulation, there is nothing in the record to show or even suggest that complainant advised the airlines of either the time-limit theory or the prohibited-entry theory. Accordingly, the instructions given to the airlines are not at all helpful to complainant's case here.

Furthermore, even if there had been an express instruction advising the airlines of the time-limit or prohibited-entry theory, it is by no means clear that such an express instruction would have been helpful to complainant's case on the merits or in this Equal Access to Justice Act proceeding, but that is a matter that need not be decided here. That is, an instruction to the airlines cannot add to or enlarge upon regulatory requirements spelled out in the Federal Register, but may only *interpret* the language in the Federal Register. The language in the Federal Register must be susceptible to being *construed* in the manner set forth in the instruction. This vital point is expanded in the immediately following discussion.

Under the Administrative Procedure Act (APA) (5 U.S.C. § 553), before a regulation is adopted imposing requirements on members of the public, the agency must engage in notice-and-comment rulemaking, giving the public an opportunity to be heard (unless one of the exceptions apply, or more formal rulemaking is required, which is not the case here).[9] The APA's safeguards are described in *United States v. Morton Salt Co.*, 338 U.S. 632, 644 (1950), as follows:

> The Administrative Procedure Act was framed against a background of rapid expansion of the administrative process as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices. It created safeguards even narrower than the constitutional ones, against arbitrary official encroachment on private rights.

[9] The Department has engaged in notice-and-comment rulemaking with respect to some of its quarantine notices (regulations), e.g., 33 Fed. Reg. 5625 (1968), and has also held public hearings preceding quarantine notices (regulations), e.g., 11 Fed. Reg. 13,268 (1946).

The "three distinct purposes" served by notice-and-comment rulemaking are described in *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983), as follows:

> Notice, as we see it, serves three distinct purposes.
>
> First, notice improves the quality of agency rulemaking by ensuring that agency regulations will be "tested by exposure to diverse public comment." *BASF Wyandotte Corp.*, 598 F.2d at 641. Second, notice and the opportunity to be heard are an essential component of "fairness to affected parties." *National Association of Home Health Agencies v. Schweiker*, 690 F.2d 932, 949 (D.C. Cir. 1982). Third, by giving affected parties an opportunity to develop evidence in the record to support their objections to a rule, notice enhances the quality of judicial review. *See Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1271 n. 54 (9th Cir. 1977) ("Such comment is often an invaluable source of information to a reviewing court attempting to evaluate complex statistical and technological decisions.").

The purposes of notice-and-comment rulemaking are similarly described in *The Connecticut Light & Power Co. v. Nuclear Regulatory Commission*, 673 F.2d 525, 530 (D.C. Cir.), *cert. denied*, 459 U.S. 835 (1982), as follows:

> The purpose of the comment period is to allow interested members of the public to communicate information, concerns, and criticisms to the agency during the rule-making process. If the notice of proposed rule-making fails to provide an accurate picture of the reasoning that has led the agency to the proposed rule, interested parties will not be able to comment meaningfully upon the agency's proposals. As a result, the agency may operate with a one-sided or mistaken picture of the issues at stake in a rule-making.

The same ALJ involved in the present case recognized that agency rulemaking is invalid if the necessary notice-and-comment rulemaking is not undertaken, in his Initial Decision filed April 23, 1987 (4 months after his *Prentice* Initial Decision), in *In re Sequoia Orange Co.*, AMA Docket Nos. F&V 907-6, 907-8, 907-9, and 907-10. The ALJ states (Initial Decision at 60-68):

2.(b) The APA Requirement that Interested Persons be Given Notice and Opportunity to Participate in Rulemaking.

The Administrative Procedure Act (5 U.S.C. § 553(b), (c) and (d)) provides:

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

The USDA interprets the notice-and-comment requirements as being inapplicable to the annual marketing policy formulated by NOAC and the USDA's incorporating "position paper," because they are exempted "general statements of policy." USDA admits that the weekly volume regulations are rulemaking actions of the type contemplated by the provisions, but does not provide interested persons advance notice and opportunity to submit written data, views, or arguments, because the regulations must be issued weekly, and the "good cause" exception is invoked by it on the basis that "notice and public procedure are impracticable, unnecessary, or contrary to the public interest." (5 U.S.C. § 553(b)(B)). Similarly, "for good cause found and published with the rule," the USDA does not publish each regulation 30 days before its effective date (5 U.S.C. § 553(d)(3)).

This means that no opportunity is ever afforded dissident members of the industry to make their positions directly known to USDA's decisionmakers through notice-and-comment procedures. And, inasmuch as was admitted at the hearing, USDA staff members do not undertake to advise their superiors of the opposing positions and arguments voiced against NOAC recommendations at committee meetings, it is not surprising that weekly regulations implementing volume restrictions have seldom varied from NOAC's recommendations. The consistency of the regulations with NOAC's recommendations was, in fact, asserted as a justification for their issuance without meaningful, independent analysis of the underlying considerations upon which they were based. Typically, USDA simply found: "this action will tend to effectuate the declared policy of the act" and "is consistent with the marketing policy . . . recommended by the committee following a discussion at a public meeting. . . ." (*See* finding of fact 4(c)).

For the Department to properly exercise its duty under the APA to give "consideration" to relevant comments by all interested parties, it may not rely upon finely drawn distinctions that allow only the voice of the industry majority to be heard.

As stated in *Holmes v. Hardin*, 449 F.2d 1009, 1016 (D.C. Cir. 1971), on the administration of another marketing order:

> "When the Secretary comes himself to make a determination of crucial facts and conclusions, he must think in terms of support in evidence and general standards, and cannot be guided solely by deference to industry desires. *Fairmont Foods, Inc. v. Hardin*, 143 U.S. App. D.C. 40, 442 F.2d 762 (Feb. 1971).
>
> * * * *
>
> "... What counts is the reality of an opportunity to submit an effective presentation, to assure that the Secretary and his assistants will take a hard look at the problems in light of those submissions."

The marketing policy, upon becoming part of the annual "position paper," set the regulatory course that the Department basically followed throughout the marketing year. For members of the industry who disagreed with NOAC to have meaningful participation in the decisional process, it was essential for their comments on the marketing policy to be considered, as contemplated by the notice-and-comment rulemaking requirements of the APA, before the policy was adopted by the Department.

The Department's acceptance of the marketing policy by its incorporation in an annual "position paper" should, therefore, not be summarily treated as coming within the APA's general statement of policy exception.

Admittedly, as was observed in *Jean v. Nelson*, 711 F.2d 1455, 1480 (11th Cir. 1983), "analyzing a rule within the general statement of policy exception is akin to wandering lost in the Serbonian Bog." Professor Kenneth Culp Davis has likewise described the distinction between a general statement of policy and a substantive rule as a "fuzzy product."[22]

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[22] K. Davis, Administrative Law Treatise, § 5.01, at 290 (1985).

Among the more instructive cases which have attempted to come to grips with this distinction are: *Jean v. Nelson, supra*; *Pacific Gas and Electric Co. v. Federal Power Commission*, 506 F.2d 33 (D.C. Cir. 1974); *Brown Exp., Inc. v. United States*, 607 F.2d 695, 701-03 (5th Cir. 1979); *Guardian Federal State Loan v. Federal Savings and Loan Ins. Corp.*, 589 F.2d 658, 666-69 (D.C. Cir. 1978); and *Airport Commission of Forsyth County, NC v. CAB*, 300 F.2d 185, 187-88 (4th Cir. 1962). *See also, Columbia Broadcasting, Inc. v. United States*, 316 U.S. 407, 416-19 (1942); and *The Attorney General's Manual on the Administrative Procedure Act* 30 n. 3 (1947).

One factor employed in deciding whether an agency action should for this reason be excepted from the APA's notice-and-comment requirements is whether it established a "binding norm." *See Pacific Gas and Electric Co. v. Federal Power Commission, supra*, at 38-39:

> "A general statement of policy . . . does not establish a 'binding norm'.[18] It is not finally determinative of the issues or rights to which it is addressed. . . . An agency cannot escape its responsibility to present evidence and reasoning supporting its substantive rules by announcing binding precedent in the form of a general statement of policy.
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>
> "[18] Parker, The Administrative Procedure Act: A Study in Overestimation, 60 Yale L.J. 581, 598 (1951)."
>
> ---

The court provided this example of an agency action fitting within this exception, *ibid*, at 34:

> "When the agency states that in subsequent proceedings it will thoroughly consider not only the policy's applicability to the facts of a given case but also the underlying validity of the policy itself, then the agency intends to treat the order as a general statement of policy."

The Department never reconsidered the policies embodied in its annual "position papers." Nor was there ever a subsequent opportunity for notice and comment when prorated volume controls were implemented by the issuance of weekly regulations; instead, notice-and-comment procedures were always waived on the basis of emergency.

However, deadlines do not necessarily constitute a sufficient reason for dispensing with the APA's requirements, and repeated waivers on this basis are not favored by the courts:

> ". . . we warn that repeated technical noncompliance will not be tolerated. . . . Assuming less calamitous circumstances, we fully expect that any future decisions will take the utmost advantage of full and open public comment." *Nader v. Sawhill*, 514 F.2d 1064, 1069 (Em. App. 1975).

"The good cause exception is essentially an emergency procedure. This court would not permit the Environmental Protection Agency to rely solely on statutory deadlines to satisfy the good cause exception in enacting clean air

laws. 'When substantive judgments are committed to the very broad discretion of an administrative agency, procedural safeguards that assure the public access to the decisionmaker should be vigorously enforced. This we believe is sound policy. . . .' *Western Oil and Gas v. United States E.P.A.*, 633 F.2d at 813." *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982).

There must be a true emergency brought about by extraordinary factors where delay would be truly harmful for the "good cause" exception to validly be invoked:

> "As the legislative history of the APA makes clear . . . the exceptions at issue here are *not* 'escape clauses' that may be arbitrarily utilized at the agency's whim. Rather, use of these exceptions by administrative agencies should be limited to emergency situations. . . ." *American Federation of Gov. Employees v. Block*, 655 F.2d 1038, 1156 (D.C. Cir. 1980).
>
> "The requirements of section 553 have been elucidated by a growing body of case law. As an elementary principle, it is clear that exceptions to section 553 notice-and-comment procedures are to be 'narrowly construed and only reluctantly countenanced'. . . . On reviewing the totality of the circumstances presented by this case, we conclude that the Department justifiably invoked the 'good cause' exception of section 553(b)(B). For here the combination of several *extraordinary factors* validates the Department's adoption of the interim rule under the mantle of 'good cause'." *Petry v. Block*, 737 F.2d 1193, 1200 (D.C. Cir. 1984). (Emphasis supplied.)
>
> "The notice and comment procedures in Section 553 should be waived only when 'delay would do real harm.'" *U.S. Steel v. U.S. Environmental Protection Agency*, 595 F.2d 207, 214 (5th Cir. 1979). Administrative efficiency is not enough. Public participation must be protected if at all possible:
>
> "The gist of the Secretary's argument is that considerations of the practical administrative efficiency of the Department required immediate action. The Secretary apparently believes that these considerations of administrative efficiency can and should override the provisions of the Administrative Procedure Act, that these considerations constitute 'good cause' within the meaning of 5 U.S.C. § 553(b)(B).
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> * * * *

This Court does not agree. The modern government which affects the average citizen generally is administrative government. The fundamental legislation by which Congress has set controls on administrative agencies is the

Administrative Procedure Act. And perhaps the most significant provision of that Act is section 553, with its requirement that administrative agencies conduct themselves through rule-making in which the public is invited to participate. . . . Section 553 is intended to insure that the process of legislative rule-making in administrative agencies is infused with openness, explanation, and participatory democracy which is essential to minimize the dangers of arbitrary and irrational decision making. While the final choice among technically available alternatives is vested with the administrative agency, it is only when decisions are made in an atmosphere of public understanding, awareness, and participation that resulting rules and regulations reflect a spirit which is consistent with our form of government. . . ." *State of S.C. Ex. Rel. Patrick v. Block*, 558 F. Supp. 1004, 1015 (D.S.C. 1983).

Based on this review, one must conclude that USDA's regulatory process which restricted the amount of product industry members were permitted to handle and sell every year for six marketing years, without ever providing any opportunity for opposing comments to be considered by the responsible agency decisionmakers, does not properly come within the exceptions provided by the APA for nonbinding general statements of policy and unexpected, extraordinary emergencies.[10]

If complainant has the power to issue interpretative instructions to the airlines making it unlawful for crew members to fail to have their baggage inspected more than a certain number of minutes before flight time (e.g., 45 minutes), or making it unlawful for crew members to enter the sterile area by having their baggage checked at the passenger inspection station even when they arrive hours before the scheduled departure time, when they are not on airline duty, and are dressed in civilian clothes, the Department has the power to completely thwart the purposes of notice-and-comment rulemaking. But, as stated above, since there is nothing in the record to suggest that the Department issued instructions to the airlines relating to the time-limit theory or the prohibited-entry theory, we need not decide here whether the Department may, under the guise of an interpretative instruction, impose on crew members such substantive requirements as the time-limit requirement or the prohibited-entry requirement. All we need decide here is that, in the absence of any interpretative instruction issued by the Department to the airlines relating to the time-limit or prohibited-entry requirements, the regulation published in the Federal Register cannot reasonably be construed in a manner that would make respondent's conduct violative of the regulation.

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[10] Although I agreed with the ALJ's notice-and-comment views in general, I held that the notice-and-comment provisions were inapplicable to the particular documents at issue in the case. *In re Sequoia Orange Co.*, 47 Agric. Dec. ___, slip op. at 156-200 (Jan. 29, 1988), *appeal docketed*, No. CV-F-88-98-EDP (E.D. Cal. Feb. 18, 1988).

The ALJ, in denying respondent's application for attorney fees and expenses, relied in part on the fact that he had originally concluded in his Initial Decision filed December 23, 1986, that respondent violated the controlling statute and regulations (Initial Decision on Application for Fees at 2). However, there is nothing in the ALJ's Initial Decision on the merits, which preceded the Judicial Officer's decision on the merits, that undercuts in any manner the analysis in the Judicial Officer's decision. The Initial Decision by the ALJ filed December 23, 1986, states in its entirety:

Preliminary Statement

This is an administrative proceeding for the assessment of a civil penalty against the respondent, Wiley E. Prentice, for a violation of the Plant Quarantine Act of August 12, 1912, as amended (7 U.S.C. §§ 161 and 162), and the regulations thereunder (7 C.F.R. § 318.13 *et seq.*). The Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture instituted this proceeding by filing a complaint on December 5, 1985. The respondent filed an answer on February 12, 1986.

The complaint alleged that on or about August 13, 1985, the respondent violated the Act and §§ 318.13-10 and 318.13-12(a) of the regulations (7 C.F.R. §§ 318.13-10 and 318.13-12(a)) by his failure to present for inspection, a briefcase in his possession at the Honolulu International Airport. Respondent has denied having violated the Act and the regulations, stating that he in fact presented his briefcase for inspection twice.

Oral hearing was held before me in Honolulu, Hawaii, on November 4, 1986. Complainant was represented by its attorney, Mr. Jaru Ruley, Office of the General Counsel, Washington, D.C. Respondent was represented by his attorney, Mr. Stephen Glassman, Los Angeles, California. The evidence of record establishes that the Agency interpreted the regulation to require crew members of flights destined for the continental United States from Hawaii to report for agriculture inspection of baggage and personal effects at inspection stations designated for their particular airline before entering a so-called "sterile area" consisting of the airline's operations control area; that the respondent was well aware of the Department of Agriculture's requirement that he, as a flight crew member, should present his baggage for examination at the agriculture inspection point designated for crew members of his particular airline before entering a "sterile area"; that respondent did not present his briefcase for inspection at the designated inspection station until he was paged and after he had entered the "sterile area"; that this was the second time that the respondent had been called from his airline's operations control area for inspection at the proper agriculture inspection point; that these measures are necessary to prevent the spread of plant diseases and pests from Hawaii to the continental United States; and that, in view of these circumstances, assessment of a two hundred fifty dollars civil penalty, as proposed by complainant, is appropriate.

Findings of Fact

1. The respondent, Wiley E. Prentice, is an individual with a mailing address of Box 303, Anahola, Hawaii 96703.

2. The respondent has been a crew member for Western Airlines for approximately 19 years.

3. From 14 years of flying Hawaii, the respondent was aware of the procedure that crew members destined to the continental United States from Hawaii were to check in at a particular agriculture inspection station before entering a "sterile area" consisting of the airline's operations control area.

4. That on August 13, 1985, the respondent's name along with names of other Western Airline crew members destined from Hawaii to the continental United States, was on a list at a designated agriculture inspection station.

5. That at approximately 2300 hours on August 13, 1985, the respondent had not reported to the designated agriculture inspection station for inspection of his baggage and/or personal effects.

6. That at approximately 2300 hours on August 13, 1985, the respondent was in the Western Airline operations area, within the defined "sterile area."

7. That only after being summoned to have his baggage and/or personal effects inspected did the respondent report to the designated agriculture inspection station.

8. That Hawaii has been quarantined to prevent the spread of dangerous plant diseases and insect infestations which are new to or not widely prevalent or distributed within and throughout the United States.

9. That the regulations in Title 7, Code of Federal Regulations, Part 318, are an integral and significant part of the Federal effort to prevent the spread of plant diseases and insect infestations from Hawaii to the continental United States.

Conclusions

I. The Agency's interpretation of § 318.13-12 of the regulations (7 C.F.R. § 318.13-12), requiring members of airline crews moving from Hawaii to the continental United States to subject their baggage and personal effects to examination by an inspector at a designated agriculture inspection station, is neither plainly erroneous nor inconsistent with the regulation.

II. Respondent, Wiley E. Prentice, failed to subject his personal effects to examination at the designated agriculture inspection station by an inspector as required.

III. A civil penalty of two hundred fifty dollars against the respondent is an appropriate sanction.

Discussion of Conclusions

I. The Agency's interpretation of § 318.13-12 of the regulations (7 C.F.R. § 318.13-12), requiring members of airline crews moving from Hawaii to the continental United States to subject their baggage and personal effects to examination by an inspector at a designated agriculture inspection station, is neither plainly erroneous nor inconsistent with the regulation.

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court stated, most unequivocally, that administrative interpretations are controlling unless in clear conflict with "the unambiguously expressed intent of Congress." *See also, Aluminum Co. of America v. Central Lincoln Util. Dist.*, 467 U.S. 380, 389 (1984); *Blum v. Bacon*, 457 U.S. 132, 141 (1982); and *Udall v. Tallman*, 380 U.S. 1, 16 (1964).

The regulation in question was promulgated, pursuant to 7 U.S.C. § 161, to "prevent the spread of a dangerous plant disease or insect infestation, new to or not theretofore widely prevalent or distributed within and throughout the United States." (7 U.S.C. § 161). The testimony of Mr. Elliott Crooks pointed out that the greatest threat of spreading plant pests to the United States mainland is through fruits and vegetables contained in baggage, hand luggage, or cargo coming into the mainland. (Tr. 6, 7). 7 C.F.R. § 318.13-12 states, in pertinent part, that,

> All baggage and other personal effects of passengers and members of crews on . . . aircraft moving from Hawaii shall be subject to examination by an inspector to ascertain if they contain any of the articles or plant pests prohibited movement by the quarantine and regulations in this subpart or Part 330 of this chapter.

In carrying out the directives of § 318.13-12, the Agency requires passengers leaving Hawaii to present their baggage and other personal effects, which are to be checked onto the aircraft, for examination at any of the agriculture inspection stations set up for that purpose at the Honolulu International Airport. All passengers' baggage which has been presented for examination at these agriculture inspection stations is identified by a conspicuous sticker before it is loaded onto the airplane. A second inspection station at a combined airport security and agriculture inspection station that is located further into the airport, provides for agriculture inspection, pursuant to § 318.13-12, of carry-on baggage and other personal effects which passengers take aboard aircraft. All passengers, as well as well-wishers, must pass through this second inspection station in order to board the aircraft.

In carrying out the directives of § 318.13-12 with respect to members of aircraft crews moving from Hawaii, the Agency requires crew members to present their baggage and other personal belongings, for examination at the agriculture inspection station designated for the crew member's particular airline. In practice, the airline provides lists of its crew members for particular flights to the inspector at the agriculture inspection station

designated to inspect its crew members. When the crew member presents baggage and other belongings for examination, a check mark is placed next to the crew member's name as it appears on the list.

This procedure has been set up by the Agency as the most simplified control mechanism for crew members who have access to the entire airport by virtue of their uniforms and/or identification. Crew members' belongings are not subject to inspection at the combined security agriculture inspection station. They are, in fact, waived through. Therefore, unlike passengers, crew members can easily avoid agriculture inspection. This procedure has been instituted to assure that the baggage and personal effects of crew members are being presented for examination without causing them undue inconvenience.

The importance of effective inspection techniques is highlighted by the 1980 infestation off the State of California by the Mediterranean fruit fly, just one of many pests found in Hawaii. According to testimony offered at the hearing in this matter, it "cost one hundred million dollars of State and Federal funds to eradicate." Moreover, foreign countries react to infestations by restricting our exports.

Applying the Supreme Court's holding in *Chevron, supra*, it is concluded that the administrative construction is not inconsistent with or clearly erroneous under the Act.

II. Respondent, Wiley E. Prentice, failed to subject his personal effects to examination by an inspector at a designated agriculture inspection station as required.

Testimony at the hearing clearly established that on August 13, 1985, Wiley E. Prentice, a Western Airlines' crew member, did not present his briefcase for examination at the agriculture inspection station designated for the examination of the baggage and other personal effects of Western Airlines' crew members. Mr. Clarence Greff, Jr. and the respondent testified that when they entered the main terminal of the Honolulu International Airport, they went through a metal detector, at a combined inspection station for passenger carry-on baggage, and then went on to the restaurant inside the terminal. Mr. Prentice further testified that after leaving the restaurant, he went directly to the Western Operations control center within the "sterile area." It was not until some three hours later, after Mr. Thomas Arkle, Plant Protection and Quarantine Officer, called Western Operations to inquire as to respondent's whereabouts, that Mr. Prentice reported to the agriculture inspection station for examination of his briefcase. Mr. Arkle called Western Operations because the respondent's name, appearing on the crew members' list provided by Western Airlines, had not been marked in any manner to indicate that Mr. Prentice had subjected his personal effects for examination at that inspection station. (Tr. 51, 52, 58).

In his answer and again in testimony, the respondent admitted both his awareness of the inspection procedure for crew members and his failure, on August 13, 1985, to comply with the procedure until summoned from the "sterile area" within the Western Operations. Accordingly, it is concluded that respondent violated § 318.13-12 of Title 7 of the Code of Federal Regulations on August 13, 1985.

III. A civil penalty of two hundred fifty dollars against the respondent is an appropriate sanction.

The Department is seeking a civil penalty of two hundred fifty dollars against Mr. Wiley E. Prentice. Title 7 of the United States Code, § 163, provides for assessment of civil penalties not exceeding $1,000.00 for the violation of provisions, rules, or regulations promulgated by the Secretary of Agriculture under, *inter alia*, § 161.

Title 7 of the United States Code, § 161, authorizes the Secretary of Agriculture to

> make and promulgate rules and regulations which shall permit and govern the inspection . . . of plants, fruits, vegetables, . . . or any other article of any character whatsoever, capable of carrying any dangerous plant disease or insect infestation . . . from a quarantined State o[r] territory or District of the United States, or quarantined portion thereof, into or through any other State or Territory or District. . . .

The Secretary has issued such regulations governing the inspection of baggage and other personal effects of passengers and members of crews on aircraft moving from Hawaii, a quarantine State, to the continental United States. Title 7 of the Code of Federal Regulations, § 318.13-12, requires, *inter alia*, airline crew members to present their baggage and other personal effects for examination by an inspector. For at least the past 14 years, the Department has required under § 318.13-12, that crew members of airlines moving from Hawaii to the continental United States must present their baggage and personal effects for examination at agriculture inspection stations designated according to the crew members' airline.

It has been amply established through testimony and respondent's answer that respondent did not present his briefcase, for requisite examination as charged in the complaint.

Respondent's failure to comply with the requisite inspection procedure impedes the efforts of the Department to prevent the spread of dangerous plant diseases or insect infestations from Hawaii to the continental United States. The spread of plant diseases and insect infestations can only be prevented with the cooperation and compliance of every passenger, airline, and crew member.

The Department has requested that a civil penalty of two hundred fifty dollars be assessed against the respondent. By his own admission Mr. Prentice was well aware of the required inspection. Additionally, this was at

least the second occasion that Mr. Prentice had been called from Western Operations by an inspector of the Department to achieve pre-flight examination of his baggage and personal effects. The requested sanction is therefore appropriate and needed to compel respondent's future compliance and to deter others from similar violations. *See, In re: Indiana Slaughtering Co.*, 35 A.D. 1822, 1831 (1976).

Proposed Order

Respondent Wiley E. Prentice is hereby assessed a civil penalty of two hundred fifty dollars ($250.00). Within thirty (30) days from the effective date of this order, respondent shall send, payable to the "Treasurer of the United States" a certified check or money order to:

United States Department of Agriculture
Field Servicing Office, Accounting Section
Butler Square West, 5th Floor
100 North Sixth Street
Minneapolis, Minnesota 55403

The certified check or money order should specify that it is in payment of the civil penalty assessed in P.Q. Docket No. 161.

The order shall become effective on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice, this Decision will become final, without further proceedings, 35 days after service hereof unless appealed to the Judicial Officer by a party within 30 days after service as provided in § 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies hereof shall be served upon the parties.

Before the Judicial Officer filed his Decision and Order in this proceeding on the merits, he filed a Tentative Decision and Order, and afforded both parties an opportunity to file briefs with respect thereto. The Tentative Decision and Order was identical to the final Decision and Order, except that the Tentative Decision and Order said that complainant's position "was not substantially justified," and that "respondent is entitled to an award of fees and expenses," whereas the final decision omits the statement that complainant's position was not substantially justified, and states that respondent "may be entitled to an award of fees and expenses . . . " (Judicial Officer's original Decision and Order at 24, note 8).

Complainant's Response to the Judicial Officer's Tentative Decision and Order does not contest the Judicial Officer's decision except as to the portion thereof relating to the award of fees and expenses under the Equal Access to Justice Act. Complainant states (Complainant's Response to the Judicial Officer's Tentative Decision and Order at 1-2):

> The complainant is not contesting the Judicial Officer's Tentative Order dismissing the complaint in this proceeding. The Judicial Officer stated in his Tentative Decision and Order that the requirements and prohibitions governing the inspection of the baggage and personal effects of aircraft crew members departing Hawaii for the continental United States were not set forth in the agency's regulations with sufficient clarity to satisfy due process requirements and, therefore, could not be enforced. In response to that statement, the Animal and Plant Health Inspection Service (APHIS) has prepared amendments which clarify its regulations regarding baggage from Hawaii. The amendments will shortly be published in the Federal Register.

The complainant, however, does contest the portion of the Judicial Officer's Tentative Decision concerning the Equal Access to Justice Act (EAJA).

It should be noted that the mere fact that complainant did not contest the Judicial Officer's tentative conclusions that the regulation was not violated by respondent under the facts of this case does not prove that complainant's original position was not substantially justified. Rather, complainant's position was not substantially justified because the regulation relied on by complainant could not possibly be interpreted in a reasonable manner to make respondent's conduct violative of the regulation, at least in the absence of a specific instruction to the airlines relating to the time-limit or prohibited-entry requirement.

C. Respondent's Defense That His Baggage Was Inspected at the Passenger Security Check Point, and Later at the Designated Airline Table, Was Raised in His Answer, and Could Have Been Anticipated from Facts Known to Complainant.

One final point remains for consideration, i.e., whether respondent's defense was so unique that complainant could reasonably proceed with the case, not thinking of such a defense. However, since respondent's answer expressly raises his defense, and complainant presented no evidence to the contrary, there was at least no reasonable basis for complainant to proceed with the case after respondent's answer was filed. Respondent's answer states (Answer at 1):

> As to the charges contained within the subject complaint, I categorically deny that I have violated any act or regulation promulgated under the Plant Quarantine Act of the United States Department of Agriculture. Specifically, I deny the allegation of my failure to present any piece of my baggage for inspection as charged. Indeed, I did *twice* present my only baggage, my hand held briefcase, for inspection. The *first* time was when I passed through the security and Agriculture X-ray point proceeding to flight operations. Upon being reminded approximately one hour before my departure as a flight crew member of having to check through the designated inspection point for crew members, I then presented my briefcase at that point again for inspection--a *second* time.

Furthermore, information was available to complainant that should have suggested such a defense even before the complaint was filed. First, Dr. Arkle's Report of Violation states that respondent arrived several hours before the 12:25 a.m. rescheduled flight. The report states that "sometime between 2030 [8:30 p.m.] and 2200 [10:00 p.m.], Wiley Prentice, a 1st officer flying for Western Airlines did arrive from the island of Kauai on an interisland commuter aircraft and did proceed directly into the sterile area of this airport to the Western Airlines operations office without clearing US Agriculture predeparture inspection" (RX 1, Item 7).

Second, respondent testified, without contradiction from Dr. Arkle, that he told Dr. Arkle that he went through Agriculture's inspection, but Dr. Arkle told him that he must "check by this station" (i.e., the designated airline inspection station) (Tr. 103). Respondent testified (Tr. 103):

> A. . . . I'm saying, "Well, really, when I came over from Kauai through Princeville, I checked in to Agriculture."

And his [Dr. Arkle's] response was: "That is not the procedure here. The procedure is that you check by this station."

Third, Dr. Arkle knew that respondent at least claimed that he had previously cleared inspection (which could only refer to previous inspection at the passenger check point, since Dr. Arkle knew he had not cleared the airline's designated inspection point). Dr. Arkle testified (Tr. 55):

> A. I waited for Mr. Prentice to return to my check-point for the Agricultural, required Agricultural inspection and to have his name removed from the list. After approximately ten minutes, at approximately 23:30 hours, Mr. Prentice still had not shown up at that check point. I went back to Western Airlines Passenger Service Supervisor, Ms. Andow, and asked her to please call the Gate or the

Operations area to determine if Mr. Prentice were on his way.

She did so and informed me that Operations was having some difficulty in obtaining Mr. Prentice's cooperation in returning as Mr. Prentice felt that he had cleared previously.[11]

Finally, Dr. Arkle knew that he had inspected respondent's baggage after calling him back from the sterile area. Dr. Arkle testified (Tr. 56):

> A. Mr. Prentice threw his briefcase, attache-type airline case, threw his attache case onto the counter. I asked, he did not say anything. I asked Mr. Prentice to please open his case for an Agricultural inspection. He did so and during the inspection I asked if he had forgotten to come through the clearance point earlier in the evening.
>
> Q. What was his -- strike that.
>
> Did you check Mr. Prentice's briefcase?
>
> A. Yes, sir, I did.
>
> Q. Did you find any contraband?
>
> A. No, sir.
>
> Q. What did you do then?
>
> A. After completion of the inspection, I checked Mr. Prentice's name off of the list and released him to return to the aircraft.

Accordingly, although complainant does not raise any issue in this respect, it is clear that complainant had sufficient information available before the complaint was issued, and certainly after the answer was filed, as to respondent's defense.

III. There Are No Special Circumstances That Make an Award of Attorney Fees and Expenses Unjust.

The ALJ and complainant rely on the facts that (i) this is a case of first impression, in which complainant was advancing an interpretation of a regulation that had not previously been construed in an adjudicative proceeding, (ii) this was the second occasion on which respondent failed to check in at the designated airline inspection station before he was paged, and

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[11] Although this last comment was (erroneously) stricken as hearsay (it should have been admitted under our Department's practice (e.g., *In re Petty*, 43 Agric. Dec. 1406, 1466 n. 53 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986)), the comment is relevant here to show what information was available to complainant before the complaint was issued.

(iii) respondent slammed his briefcase down hard on the table when he responded to Dr. Arkle's summons. As to this last circumstance, the ALJ states (Initial Decision on Application for Fees at 5-6, note 1):

> However, in assessing the reasonableness of the agency filing this complaint against respondent, it is to be noted that the agency was supporting an inspector who had been subjected to belligerence while performing his duties. Respondent disputed the inspector's version, but I believed the inspector and found him to be the more credible witness; in fact, respondent was highly emotional and exhibited anger throughout the hearing itself and his attorney had to caution him to calm himself.

The fact that this is a case of first impression involving the interpretation of a regulation that had not been previously construed in an adjudicative proceeding would have been a weighty circumstance in this Equal Access to Justice Act proceeding, except for the fact that the interpretation advanced by complainant is not a possible, reasonable interpretation of the regulation, at least in the absence of a prior specific instruction to the airlines relating to the time-limit or prohibited-entry theories.

Similarly, the fact that this was allegedly respondent's second failure to follow required procedure would have been a weighty circumstance, if there were any reasonable basis to complainant's position that his conduct here was in violation of the regulation. But, as shown above, there was no substantial basis for complainant's position.

Finally, although I agree with the ALJ that it is reasonable for an agency to support an inspector who had been subjected to belligerence while performing his duties, the agency must still have a reasonable basis in fact and law for bringing an action against the respondent. Complainant had no such reasonable basis here and, therefore, respondent's belligerence is not a circumstance that makes an award of fees and expenses unjust.

IV. Determination of Amount of Attorney Fees and Expenses.

Complainant does not dispute the number of hours claimed by respondent's attorney or the itemized expenses totaling $1,084.44. But complainant disputes the $75-per-hour rate approved by the ALJ, if an award is justified, because respondent's attorney failed to file an affidavit stating "the hourly rate which is billed and paid by the majority of clients during the relevant time periods," or, alternatively, information about two attorneys "with similar experience, who perform similar work, stating their hourly rate" (sec 7 C.F.R. § 1.190(b)(1), (2) (1988)).

In the first place, complainant is in a poor position to be overtechnical with respect to the requirements of the rules of practice since the rules of practice erroneously state that they are not applicable to proceedings (such as this) where the complaint was filed after September 30, 1984 (see 7 C.F.R. § 1.182 (1988)), and the revised rules of practice, omitting that erroneous statement, were not published until September 23, 1988, effective October 24, 1988 (53 Fed. Reg. 36,949 (1988)).

Second, since (i) the award for attorney fees cannot, under the statute, exceed "$75 per hour unless the agency determines *by regulation* that an increase in the cost of living or a special factor . . . justifies a higher fee" (5 U.S.C. § 504(b)(1)(A) (Supp. III 1985) (emphasis added)), (ii) no such regulation increasing the maximum attorney fee has been promulgated by this agency, and (iii) $75 is so far below the fee charged by attorneys comparable to respondent's attorney in Los Angeles, I agree with the ALJ's determination that $75 per hour is the proper amount to be awarded, provided that an award is justified.

In this respect, if I had disagreed with the ALJ, I would have afforded respondent's attorney an opportunity to file the required affidavit. Amendments to complaints and answers are frequently permitted in disciplinary proceedings before this Department, and there is no reason why amendments should not similarly be permitted with respect to an application for attorney fees and expenses. But since the $75 per hour allowed is only half of the $150 amount claimed, and appears to be quite low for the Los Angeles area, I agree with the ALJ's disposition of this issue as to the proper hourly rate for the attorney's fee.

For the foregoing reasons, the following order should be issued.

Order

Respondent is awarded attorney fees and other expenses under the Equal Access to Justice Act in the amount of $4,834.44.

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